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MR. R. NARAYANASWAMI IYER, B.A., B.L.,
Advocate, High Court, Mylapore, Madras.

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SAT NARAIN *v.* BEHARI LAL, I. L. R. 6 LAH. 1 (P.C.), AND AFTER.

The decision of their Lordships of the Privy Council in *Sat Narain* v. *Behari Lal*[1] has introduced complications as will be seen from the subsequent reported cases discussing and following the principles laid down in the Privy Council case in matters arising in insolvency both under the Presidency Towns Insolvency Act and the Provincial Insolvency Act. I am attempting to analyse the point and advert to hardships so that, if need be, suitable provisions may be introduced in the Acts to simplify matters, avoiding multiplicity of proceedings and accomplishing easy distribution of the proceeds realised by selling properties answerable for the just debts of the insolvent.

Conceding that the share of the father insolvent undoubtedly vested in the Receiver, the question arose before the Privy Council, in a case of pre-emption, if the son's share also vested in him so as to sequester the co-sharer's right of pre-emption, where it was held, not with reference to the provisions of the Civil Procedure Code but solely with reference to S. 17 and S. 52 (*b*) of the Presidency Towns Insolvency Act, that the entire joint family property did not vest in the Receiver but that, as observed on page 23, "under the provisions of S. 52 or in some other way the property of the sons may, in a proper case, be made available for payment of the father's just debts." Section 2, defining 'property,' contemplated, according to the Board, an absolute and unconditional power of disposal. I may at once mention that in the Provincial Insolvency Act there is no provision corresponding to S. 52 (2) (*b*) but Courts

1 (1924) L.R. 52 I.A. 22: I.L.R. 6 L. 1: 47 M.L.J. 857 (P.C.).

have applied the same principle nevertheless. Being a case arising out of the right to enforce pre-emption, it was unnecessary for the Board to say anything and in fact they said nothing definitely about the power of sale over the son's interest which a father under the Hindu Law undoubtedly possessed, in suitable cases, inasmuch as they held that the sons had not lost their vested interest of ownership, which gave them a right to pre-empt, by the fact of father's insolvency alone.

The above case came up for consideration in almost all the High Courts in India where they had to decide what vested in the Receiver on the insolvency of the father. In normal cases, there is no doubt that, on the vesting order following an adjudication of the father, the Official Receiver can, privately, without resort to the Insolvency Court, sell away the entire joint family property as a Civil Court does in the case of attachment and sale of the entire coparcenary property at the instance of a creditor who had obtained a decree against the father alone, the sons not having been made parties, subject to the right of the sons to raise objections on the score of illegality or immorality of the debts of the father in subsequent proceedings.

Practical difficulties, however, arise when the adjudication precedes or succeeds a creditor's attachment of the whole or the son's property alone or when, in the case of enforcement of pre-partition debts of a father by a suit, division by metes and bounds or division in status alone has been or is sought to be effected by a suit by the son or otherwise before or after adjudication. The matter came up for decision in *Adusumelli Gopalakrishnayya* v. *Peyyath Gopalan*[2], *Subramania Aiyar* v. *Sabapathy Aiyar*[3] and In the matter of *Balusami Aiyar*.[4] Before coming to that, it is well to draw attention to the Full Bench decision reported in *T. S. Balavenkata Seetharama Chettiar* v. *The Official Receiver, Tanjore*[5] where the case-law before the Privy Council case has been summarised. In this case it has been definitely held that on the father's adjudication as an insolvent the father's share and his power or capacity to dispose of the son's interest vests in the Court or the Receiver appointed under S. 28 of the Provincial Insolvency Act as per this section and not as 'property' under S. 2 (*d*) of the Act. But in *The Official Receiver, Anantapur* v. *Ramachandrappa*[6]

2 (1926) I.L.R. 51 M. 342: 54 M.L.J. 674.
3 (1927) I.L.R. 51 M. 361: 54 M.L.J. 726 (F.B.).
4. (1928) I.L.R. 51 M. 417: 55 M.L.J. 175 (F.B.).
5. (1926) I.L.R. 49 M. 849: 51 M.L.J. 269 (F.B.).
6. (1928) I.L.R. 52 M. 246: 55 M.L.J. 721.

Mr. Justice Devadoss on a difference of opinion between Mr. Justice Odgers and Mr. Justice Curgenven observed at page 259 that "in the absence of a section corresponding to S. 52 there is no warrant for holding that the power to sell the son's share vests in the Receiver. The matter required to be examined by a Full Bench."

Though after division a father cannot sell the son's share in payment of his debts binding on the erstwhile coparcenary, yet a Court at the instance of an attaching creditor in respect of a pre-partition debt can sell away the entire property, the father's as well as the son's share, in execution though at the time of attachment the coparcenary had been disrupted by reason of division since the suit. This is an instance of an executing Court having greater powers than the father himself whose debts are sought to be satisfied by the Court sale. Vide *Subramania Aiyar* v. *Sabapathy Aiyar.*[3] The same result would follow if the son is impleaded where the partition was effected prior to the suit. If the son is not impleaded, the creditor can proceed only against the father's share.

The complication referred to in this connection arises when after the adjudication of the father the son's share has been attached by a creditor in which case it had been held in *Adusumelli Gopalakrishnayya* v. *Peyyath Gopalan*[4] that the Official Receiver cannot exercise the power of sale as only the power of the father to sell the share of the sons passed to the Official Receiver, which again was subject to the same qualification and burden as it was in the father's hands. It does not appear from the short judgment if the creditor obtained a decree against the son alone and attached his share in some of the properties left after the Official Receiver sold a portion of the coparcenary property or against the father and son and attached the son's share in them, after the father's adjudication, finding it impossible in law to sell the father's share by reason of the insolvency of the father. The Official Receiver in this case would appear to have sold privately some portion of the son's share also under the normal power inherent in him on adjudication but it was only in respect of exercise of such a power after attachment the Court had to say that the Official Receiver could not exercise the power. Whether the same view will be taken if the decree was passed against the father and son or if, even though the son was not a party, a decree was passed,

2. (1926) I.L.R. 51 M. 342: 54 M.L.J. 674.
3. (1927) I.L.R. 51 M. 361: 54 M.L.J. 726 (F.B.).

capable of execution against the entire property of the father and son is not a matter quite free from difficulty. It stands to reason, in such a case, that the entire sale should be stopped so as to enable the Official Receiver to sell the father's and the son's share by resorting to appropriate proceedings in the Insolvency Court if attachment can be held to prevent father's alienation *in toto* and if by the supervening adjudication, the power cannot vest in the Receiver. In *Sivasami Odayar* v. *C. R. Subramania Aiyar*[7] it has been held that the sale following an attachment of the property of father and son, the father being adjudicated an insolvent later, must be stayed at the instance of an interim Receiver appointed under S. 20 of the Provincial Insolvency Act. Under S. 28 of the Act, the Official Receiver has absolute control over the realisation of assets for distribution amongst the general body of creditors, so that during the pendency of the insolvency proceedings no Civil Court can possibly cause a sale of the share of the insolvent or that of the son to be held in view of the power of selling such a share vesting in the Receiver as the property of the insolvent. This power must be capable of enforcement for the benefit of the general body of creditors for, otherwise, there is no point in recognising the power and at the same breath rendering the same ineffectual. The power vesting in the Receiver is destroyed by the supervening attachment to the limited extent only, viz., it cannot be exercised privately. But it does vest in him as property of the insolvent available for the general body of creditors who is represented by the Official Receiver. He could have applied under S. 4 of the Provincial Insolvency Act and got an injunction restraining the decree-holder from further proceeding with the sale which was not attempted in this case. Vide *Hajee Ally Mohamed* v. *M. M. Bham.*[8]

Now there is another class of cases leading to the same result, viz., the filing of a suit for partition by the sons against the father subsequent to the adjudication of the father. In such a case it has been held by the Madras High Court in In the matter of *Balusami Aiyar*[4] that on the adjudication of a Hindu as an insolvent under the Presidency Towns Insolvency Act (III of 1909), an order may be passed by the Court in a proceeding to which the sons were parties that the son's interest as such in the joint family property did not vest in the Official Assignee but that the latter was entitled to joint possession and could alienate the son's share also to discharge

4 (1928) I.L.R. 51 M. 417: 55 M.L.J. 175 (F.B.).
7. (1931) I.L.R. 55 M. 316: 62 M.L.J. 68.
8. (1928) I.L.R. 6 Rang. 352.

the joint debts of the insolvent, if necessary. It was further held by a majority that the institution of a suit subsequently by the sons against the father for partition of the family properties put an end to the joint family status and with that to the right of the father to alienate his son's share also for his debts and by that means extinguished the right of the Official Assignee also, whose right was only co-extensive with that of the father, to alienate privately the son's share also for the father's debts. Mr. Justice Phillips, however, took the contrary view, viz., that a mere division in status would not defeat the Official Assignee's power, already established, to sell those shares for a proper purpose. Mr. Justice Ramesam on page 439 observes that the substantial right of the Official Assignee is not lost but only one of several remedies open has been extinguished. Possibility of the Official Receiver filing suits against the sons, obtaining decrees and selling the son's share also is suggested. His getting himself impleaded in the partition suit, stepping into the shoes of the insolvent, or applying for the creditors to be made parties in that suit so that the findings as to the nature of the debts may bind all and asking for a decree providing for the payment of such debts as are not illegal or immoral is also suggested A third remedy, viz., in garnishee proceedings, a question can be decided by the Insolvency Judge, if necessary, is also referred to. On page 443 it is observed that the son's liabilities continue as before and they can be worked out by suitable proceedings, but not by private powers of sale. Mr. Justice Madhavan Nair, on page 447 of the judgment, observes that the Official Assignee can institute suits against the sons and enforce the decrees in such suits by selling the son's interest. Vide *Jagannatha Rao* v. *Viswesam*[9] and *Subramania Aiyar* v. *Sabapathy Aiyar*.[3] In the pending partition suit the Official Assignee may apply for the creditors to be made parties and by proper procedure can obtain decrees which they can execute against the son's interests.

What suitable proceedings can be taken came up for consideration before the Madras High Court in a case reported in *A. N. Ramachandra Aiyar* v. *The Official Assignee of Madras*[10] which was one under the Presidency Towns Insolvency Act. In that case, after adjudication, the sons filed a suit for partition with the result that the power to sell privately the son's share was extinguished. But the Official Assignee filed a peti-

3. (1927) I.L.R. 51 M. 361: 54 M.L.J. 726 (F.B.).
9. (1924) I.L.R. 47 M. 621: 46 M.L.J. 590.
10. (1930) I.L.R. 54 M. 739: 61 M.L.J. 66.

tion in the Insolvency Court under S. 7 of the Act corresponding to S. 4 of the Provincial Insolvency Act for a declaration that the son's share also was liable to be proceeded against for the payment of the just debts of the father, not tainted with illegality or immorality, and for selling their property consequential thereon. It was held that the Insolvency Court had power to grant the prayer and the Court granted the reliefs asked for. This was regarded as a logical sequence of the pious obligation of the sons to pay the father's debts, not tainted with illegality or immorality contracted before partition though a partition had taken place in the interval. Mr. Justice Curgenven regarded the possible remedies suggested by Mr. Justice Ramesam in the 51 Madras Full Bench case as *obiter* but, however, he decided in favour of granting the declaration. The result is that what was extinguished in the hands of the Receiver was revived by order of Court obtained at his instance, enabling him to sell the sons' share privately, being armed with this decretal order, or through the Insolvency Court by attaching and selling the same inasmuch as, apparently, the capacity to sell the sons' share, vested in the Receiver in the first instance and extinguished by the supervening partition, got restored as it were by reason of the order of the Insolvency Court. The power of sale being regarded as property of the insolvent vested, and re-vested in the Court or the Receiver, as the case may be, on the happening of the events referred to above. To the same effect are the decisions of the Allahabad High Court reported in *Anand Prakash* v. *Narayan Das Dori Lal*[11] and *Bankey Lal* v. *Durga Prasad*.[12] The latter decision is very instructive on the bearing which a *bona fide* or a *mala fide* partition has on the rights of the Official Receiver when the father alone has been adjudicated an insolvent. A partition which did not provide for the payment of the just debts of the father could in no sense be regarded as a *bona fide* partition and the Insolvency Court before which an application is made by the Receiver can proceed to give relief on that footing. If the father's share was sufficient to satisfy the entire debts, no difficulty is presented. If it is not sufficient, if recourse has to be made to the sons' share also, it is liable to contribute to the discharge of the entire debt, wholly or in part, in which case, it is open to the Receiver to apply under S. 4 of the Provincial Insolvency Act—and these were cases under that Act—and get a declaration. On page 930 His Lordship Mr. Justice Sulaiman held there is no reason why the Receiver should be compelled to go outside

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11. 1931 A.L.J. 122 (F.B.). 12. 1931 A.L.J. 917 (F.B.).

the Insolvency Court and file a separate regular suit to enforce the payment of the creditors' debts out of the shares in the joint property which have been taken by the separated sons without making arrangement for their payment. Mr. Justice Mukerji refers on page 940 to the scheme of the law of insolvency and says that the Receiver is to take hold of all the properties of the judgment-debtors, *i.e.*, all the properties, which are available to the judgment-debtor to utilise for the payment of his debts, are available to the Receiver for the same purpose. The creditors are estopped from pursuing their usual remedy against the debtors by means of suits and executions. The Receiver can pursue all the remedies open to the creditors under the law. The only difference is that the Court should grant sanction for the purpose. The learned Judge does not see eye to eye with the Madras decision—In the matter of *Balusami Aiyar*[4]—apparently as regards only the remedy open to the Receiver. According to the Allahabad High Court a subsequent suit for partition or a decree passed therein does not prevent the Receiver from selling properties allotted to members of the family other than the insolvent. *Sita Ram* v. *Beni Prasad.*[13] Where son's interest is involved, a proceeding in insolvency is quite sufficient. What has the Receiver to do after obtaining the declaration prayed for? Can he sell privately or only through Court? It has been held in *Sitaram* v. *Receiver of the Estate of Ram Prasad*[14] that where property in the hands of Hindu sons can be made available for payment of the father's debts, the Receiver of the father is entitled to attach and sell the property, but he has no right to dispossess the sons of the insolvent from the property in their possession. The words "seize" and "attach" in the reported cases were indifferently used to express the same idea. Vide *The Official Assignee of Madras* v. *Allu Ramachandra Aiyar.*[15]

Messrs. Justices Ramesam and Cornish in a case arising under the Presidency Insolvency Act, S. 7, reported in *Krishnamurthi Pillai* v. *Sundaramurthi Pillai,*[16] have held that though S. 7 is widely worded, it does not follow that every possible dispute between the Official Assignee and the son can be dealt with thereunder. So long as the son has not appeared before the Insolvency Court no question can arise between him and the Official Assignee and the question of the binding nature of

4 (1928) I.L.R. 51 M. 417: 55 M.L.J. 175 (F.B.).
13 (1924) I.L.R. 47 A. 263.
14 1932 A.L.J. 285.
15. (1922) I.L.R. 46 M. 54: 43 M.L J. 569.
16. (1931) I.L.R. 55 M. 558: 63 M.L.J. 37.

the debts cannot be decided at the instance of the Official Assignee behind the back of the son. Such a thing cannot be done under S. 36 of the Act corresponding to S. 59-A of the Provincial Insolvency Act. The question regarding the binding nature of the debt between the father and the son should be decided in a partition suit to which the Official Receiver is a party. Mr. Justice Ramesam referred to his own observations in 51 Madras case regarding the third remedy open and how those observations had been misunderstood and misapplied by Mr. Justice Curgenven in the later case. The question whether the sons can fill the character of garnishees was not argued before them nor decided by them and the view was only hypothetical on a possibility rendering the remedy non-existent if the condition did not exist.

"The power does not convert the sons' property into the insolvent's property especially when it is remembered that the power ceases to exist on the severance of the joint family No suit for partition can be filed before the Insolvency Court by the Official Receiver as representing the insolvent. Questions between the Official Assignee and his son cannot be decided by the Insolvency Court but must be decided in a partition suit to which the Receiver is a party. I do not agree with the observation of Curgenven, J. that by money claim is meant any claim which can be ranked as divisible assets nor can it be said that because the father has right to sell the son's share in the joint family he has got a money claim against the son. The father can never sue the son for money in this account. The effect of the Hindu joint family law is to give the father or creditor a right to sell the son's share but no more."

Two points are fairly indicated. The son is not a garnishee and proceedings before ordinary Courts against the son so as to reach his share is the only remedy. In view of this conflict of opinion, the uncertainty can be set at rest only by an authoritative pronouncement of a Full Bench. As the law stands at present, the best course will be for the Receiver to file a suit for partition so as to make sufficient property available for the discharge of just debts of the father and in the meantime to have a Receiver appointed for the son's share also. It is also open to individual creditors of the father to sue the son and get a decree operating on his share so that so far as the relief against the insolvent is concerned he can prove the debt before the Official Receiver and as against the son the decree obtained in the suit may be executed.

The question of Court-fee for a suit for partition with suitable declaration and for a suit against the son alone may present some difficulty. In the latter case it will be *ad valorem* whereas in the former case it is a fixed fee according as the suit is filed in the higher or lower Court and according to the value of the relief sought.

The net result of the authorities is this:—

(1) On adjudication, the father's share and the power to sell the son's share vest in the Receiver which can be sold by him privately, if nothing has happened in the meanwhile.

(2) If the sons' share had been attached or a division in status had taken place prior to the exercise of the power of private sale, the power is extinguished and cannot be exercised as such.

(3) In the case falling under (2) above, it is open to the Official Receiver according to the earlier decision to apply under S. 4 or S. 7 of the respective Acts to get a declaration to operate upon the sons' share and the consequential power of sale also can be granted but not according to the later decision which requires a suit to be filed.

(4) According to the Madras High Court the power of sale so got by order of Court can perhaps be exercised out of Court by reason of the Receiver being armed with it whereas according to the Allahabad High Court it has got to be attached and sold by the Insolvency Court.

If the filing of a partition suit at the instance of the Receiver is the only remedy, then this decision must be understood to have set a premium on multiplicity of proceedings taking away the summary exercise of insolvency jurisdiction for the benefit of creditors. If this is the necessary result of the decision in *Sat Narain* v. *Behari Lal*,[1] the sooner the Insolvency Law is amended to secure speedy realisation of distributable assets, the better for all concerned. Suppose the entire property of father and son has been attached, then there is division in status with or without division by metes and bounds and no provision has been made for the payment of the father's debts and the father is subsequently adjudicated an insolvent. What is the position of the Receiver, so far as getting the sons' share sold is concerned? In this case the insolvents' share alone vests in the Receiver and the power of sale does not vest in him at all as there was no coparcenary at the time of adjudication. But inasmuch as all the creditors can, ignoring the partition, proceed against the sons' share, the Official Receiver, stepping into his shoes, can either apply under S. 4 or S. 7 of the respective Acts and get a declaration if the earlier view is sound or file a suit for partition if the later view is sound and get proper decrees passed involving the sons' share also. The execution

1. (1924) L.R. 52 I.A. 22: I.L.R. 6 L. 1: 47 M L.J. 857 (P.C.).

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sale has to be stopped and possession handed over to a Receiver pending the result of the application or suit.

Suppose an adjudication has not taken place but in a creditor's petition against the father an interim Receiver has been appointed under S. 20 of the Provincial Insolvency Act before which the whole property had been attached by the ordinary Court and prior to sale a division in status alone had been effected without making provision for the payment of the father's debts. Pending adjudication, what is the interim Receiver expected to do and what are his powers? The relevant sections of the Provincial Insolvency Act are Ss. 20, 28 (7), 51, 52 and 56 (5). Under S. 20 the Court appoints an interim Receiver of the property of the debtor with directions to take immediate possession thereof, whereupon the interim Receiver shall have such of the powers conferrable on a Receiver appointed under the Code of Civil Procedure as the Court may direct. The object is to preserve the assets for the benefit of the general body of creditors. In *Sivasami Odayar* v. *C. R. Subramania Aiyar*[7] it has been held dissenting from *C.R.Subramania Aiyar* v. *The Official Receiver, Tanjore*[17-19] and following *Haranchandra Chakravarti* v. *Jay Chand*[20] that an interim Receiver has power to apply under S. 52 for stay of sale proposed to be held under an attachment effected prior to the presentation of the petition. The provision in the section that the costs of the suit in which the decree under execution was passed and of the execution shall be a first charge on the property delivered to the Receiver and that the Receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge shows that in such cases the Receiver alone is expected to have further conduct of proceedings in the matter of sale with or without any direction of the Insolvency Court as the case may be. In *Sivasami Odayar* v. *C. R. Subramania Aiyar*[7] the property of father and son was attached and the father came before the Insolvency Court later. The sale under the said attachment was held to be liable to be stayed and any sale held in violation of this principle was held to be void. Interpreting Ss. 51 and 52 of the Provincial Insolvency Act, the Calcutta High Court in *Haranchandra Chakravarti* v. *Jay Chand*[20] held that an attaching creditor was only entitled to be classed with other unsecured creditors on the basis of a rateable distribution of assets if before the sale the debtor came within the jurisdiction

7. (1931) I.L.R. 55 M. 316: 62 M.L.J. 68. 17-19. (1925) 50 M.L.J. 665.
20. (1929) I.L.R. 57 C. 122.

of the Insolvency Court. Vide *Mahasukh Jhaverdas* v. *Valibhai Fatubhai*,[21] *Kanai Lal Marwari* v. *Babu Lal Muchi*[22] and *Ramanathan Chettiar* v. *Subramania Chettiar*.[23] Under S. 56 (5) interim Receivers appointed under S. 20 can invoke in their aid the provisions of S. 56 under which the Court at or after adjudication appoints a Receiver for the property of the insolvent which thereupon vests in him, so that the interim Receiver has, to all intents and purposes, the rights and obligations of a post-adjudication Receiver. If the words "so far as may be" are interpreted to be standing in the way of placing both the Receivers on a par, it is necessary that the sections should be so amended as to confer upon both the Receivers necessary powers to effectuate the object of the Insolvency Act.

The provision in S. 28 (7) which deals with the relating back, viz., that an order of adjudication shall relate back to, and take effect from, the date of presentation of the petition on which it is made renders the Official Receiver to be deemed to be the owner of the property from the date of presentation of the insolvency petition and as such entitled to impeach all dealings and transactions entered into by the insolvent even prior to the date of adjudication.

LP2327

As matters now stand—

(1) until the order of adjudication is made there is no insolvency and the debtor retains the property;

(2) no vesting takes place until adjudication. Once the order is made the legal fiction operates; and

(3) the insolvent not only ceases to be the owner but is regarded as not having been the owner between the commencement of the petition and the date of the order of adjudication.

If the fact of division in status prior to adjudication is held to make a difference and to render the principles laid down in the 51 Madras Full Bench case and the 61 M.L.J. case not applicable despite the observations of Justice Bhashyam Aiyangar on page 753—"on the insolvency of the father (*of divided status*)"—the Official Receiver has the only remedy of filing a suit for partition against the sons.

A creditor is entitled to look up to the property of the coparcenary as it existed when the loan was contracted and no subsequent division, with or without intent to defraud his rights, can affect his interests. Apart from insolvency, if he institutes proper proceedings with proper parties he can proceed

21. (1927) 30 Bom. L.R. 455. 22. A.I.R. 1930 Pat. 604.
23 (1924) I.L.R. 48 M. 656: 47 M.L.J. 759.

against the entire property, if necessary. If insolvency supervenes, then the Receiver who steps in to administer the estate as representing the insolvent and his property and for the benefit of the general body of creditors gets all the powers of the creditors and the insolvent enabling him to convert the property into money privately or through Court for the benefit of creditors. No prior attachment nor division of property can interfere with the right of the Receiver to get in the whole property in whomsoever hands it may be for the business of insolvency administration. Whatever property the insolvent had at the time of incurring the debt over which he had a disposing power at the time must pass through the crucible of the Receiver and the law provides for no escape from it. The fact that the original debtor was the father and by the time proceedings are started he died and his sons became owners of the debtors' property and one of them happened to be adjudged an insolvent will not give the father's creditors a priority over the son's creditors. The proceeds of the sale of the insolvent's property will have to satisfy all the creditors equally. According to the Mahomedan Law the ancestors' creditors may have a preferential claim when the heirs become insolvents owing to the peculiar feature of that law and the nature of the estate possessed by the owner and taken by the heirs. There is no coparcenary, no right by birth and no pious obligation to pay the just debts of the father in Mahomedan families. The fact that even in the Hindu Law Mitakshara family, at a partition, provision should be made for the father's debts and the residue alone should be divided among the coparceners does not render so much property as is necessary for the purpose the separate property of the father simply because if the father was so minded he could have alienated it for antecedent debts. If the father had borrowed debts and the sons also had borrowed debts, the former would be binding on the whole family property brought into hotchpot while the latter would be binding only on the share allotted to the sons and the division might take place on that footing. It is quite a different thing to urge that even after the father's death if the property came to the sons by survivorship it is liable in the first instance to satisfy the father's creditors owing to his pious obligation and in the next instance alone to satisfy his own personal creditors. There is absolutely no warrant for this distinction. So long as the father's creditors have not satisfied themselves prior to the insolvency of the sons they must rank equally with the sons' creditors because the proceeds should be realised from one source, viz., the property of the insolvent. The circumstance that the ancestor

could not be adjudged by reason of his death and the descendant likewise cannot be adjudged because of his pious obligation only cannot attract the application of any different principle. Vide *Bhola Nath* v. *Maqbul-un-nissa,*[24] *Kandasami Chetty* v. *Jaypandi Nadar,*[25] *Sankar Lal* v. *Muhamed Ismail*[26] and *Gade Lakshminarasimham Pantulu* v. *Pillalamarri Jagannadha Rao Pantulu.*[27] Any question of priority, if it exists at all, has to be decided before the Insolvency Court.

Relying on *Adusumelli Gopalakrishnayya* v. *Peyyath Gopalan*[2] and In the matter of *Balusami Aiyar*[4] Mr. Justice Madhavan Nair in a case reported in *The Official Receiver, Coimbatore* v. *M. Rm. K. A. R. Rm. Arunachalam Chetti*[28] held that when the entire property belonging to the judgment-debtor and his sons had been attached before the judgment-debtor was adjudicated as an insolvent, the petition for adjudication itself having been presented after attachment, the father's power of disposal of the sons' share had been destroyed by the attachment and the Official Receiver cannot, therefore, get any power to deal with the sons' share by reason of the adjudication. The attachment effected could not amount to the attachment of the father's right to dispose of the son's share to pay his own debts. Even the sale proceeds could not be appropriated by the Official Receiver as no authority was cited in support of the proposition that the suspension or destruction of the power did not in any way affect the right of appropriation. The proceeds of the sale of the son's share was not regarded as the property of the debtor (insolvent) though S. 51 was referred to. This decision was on 28th October, 1930 and there was an earlier decision of a Bench on 12th September, 1930, reported in *Ramachandra Aiyar* v. *The Official Assignee of Madras*[10] where Justices Curgenven and Bhashyam Aiyangar had to decide what was property of the insolvent which was available for the Official Receiver while acting for the general body of creditors. Much water has flown since 1926, when *Adusumelli Gopalakrishnayya* v. *Peyyath Gopalan*[2] was decided. If the case reported in *Ramachandra Aiyar* v. *The Official Assignee of Madras*[10] had been brought to the notice of his Lordship, *Balusami Aiyar's case*[4] would have received that interpretation which was contended for by the appellant. Any way Mr.

2 (1926) I.L.R. 51 M. 342: 54 M.L.J. 674.
4. (1928) I.L.R. 51 M. 417: 55 M.L.J. 175 (F.B.).
10. (1930) I.L R. 54 M. 739: 61 M.L.J 66
24. (1903) I.L R. 26 A. 28. 25. A.I.R. 1929 M. 609.
26. A.I.R 1930 A. 552. 27. (1915) 18 M.L.T. 147.
28. (1930) 33 L.W. 607.

Justice Madhavan Nair's view does not commend itself to principle or authority. From the foregoing aspects, it has become abundantly clear that the decision of the Privy Council in *Sat Narain* v. *Behari Lal*[1] has been the parent of unexpected complications which are more startling than the contentions observed to be startling by their Lordships. These would be avoided if the Full Bench decision of the Lahore High Court is restored.

It seems to me that in the interests of justice and fair dealing with the creditors of a father, clear provisions should be made whereby the Receiver is entitled to sell away the whole property of the joint family, now or erstwhile, subject to objections by the sons on any legal ground. The interim Receiver should be clothed with all the powers of the Receiver on adjudication.

R. KRISHNASWAMI AIYANGAR,
Advocate, Cuddalore.

SUMMARY OF ENGLISH CASES.

BELL *v.* LEVER BROTHERS, LTD., (1932) A.C. 161 (H.L.).

Mistake—Mutual mistake—Principal and Agent—Failure to disclose misconduct—Compensation amount paid in ignorance—Suit to recover—Maintainability—Plea of unilateral mistake.

The principle that mutual mistake renders a transaction void is confined to cases in which the mistake is as to the substance of the whole consideration, going, as it were, to the root of the matter and does not apply where the mistake is only as to some point, a material point it may be, and even one which may have been the actuating motive of the parties, an error as to which does not affect the substance of the whole consideration.

L company, who had a controlling interest in *N* company, entered into an agreement with *B* that the latter should remain in the service of *N* for a certain period. Subsequently the business of *N* company was amalgamated with another concern and thereupon *L* negotiated with *B* to give up his position in *N* company and paid compensation in pursuance of the settlement arrived at. Later on *L* company was informed that *B* had, during his service, entered into certain secret transactions rendering him liable to dismissal. It appeared, however, that this circumstance was not present to the mind of *B* when the settlement was being negotiated. *L* having sued *B* to recover the compensation paid under the settlement,

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1. (1924) L.R. 52 I.A. 22: I.L.R. 6 L. 1: 47 M.L.J. 857 (P.C.).

Held, (Viscount Hailsham and Lord Warrington of Clyffe dissenting), that the settlement was not vitiated by mutual mistake and that the action was therefore not maintainable.

Held, further, that the settlement was not vitiated by unilateral mistake because *B* was under no legal obligation to disclose to *L* the secret transactions he had entered into.

Principles applicable to cases of mistakes laid down.

WARING *v.* FODEN, (1932) 1 Ch. 276 (C.A.).

Grant—Conveyance of land—Exception of "mines, minerals and mineral substances"—Sand and gravel whether included—Meaning of word "minerals".

The word "minerals" when found in a reservation out of a grant of land means substances exceptional in use, in value and in character and does not mean the ordinary soil of the district which if reserved would practically swallow up the grant. Secondly, in deciding whether or not in a particular case exceptional substances are "minerals" the true test is what the word means in the vernacular of the mining world, the commercial world, and land-owners at the time of the grant and whether the particular substance was so regarded as a mineral. The fact that certain substances of the district can be worked for the purpose of profit may have a bearing on the question whether they have been recognised as included in the term "minerals" but does not necessarily determine that they have been ordinarily understood to be so included.

Held, on the evidence that the reservation of "all mines, minerals and mineral substances" in the conveyance did not include sand or gravel.

DE TCHIHATCHEF *v.* THE SALERNI COUPLING, LTD., (1932) 1 Ch. 330.

Estoppel—Representation as to legal effect of document—Prospectus issued by Company—Reference to contract with third party—Acquiescence by third party in representation—Effect.

If a person authorises or permits another to make a representation for the purpose of it being acted upon and it is acted upon, that person cannot afterwards be heard to say that the representation is not true. This applies even if the representation is as to the legal effect of the document, if there is no qualification in the representation suggesting that the document, and not its effect as represented, is to govern the relationship of the parties.

A prospectus issued by a Company contained a clause to the effect that the Company had entered into favourable contracts with a well-known foreign firm. The foreign firm and their agents having had acquiesced in the insertion of the clause,

Held, that the foreign firm and their representatives were estopped from setting up any other construction of the agreement with them than that set out in the prospectus.

MABRO *v.* EAGLE, STAR AND BRITISH DOMINIONS INSURANCE COMPANY, (1932) 1 K B. 485 (C.A.).

Practice—Addition of party as plaintiff—Discretion of Court—Remedy barred by limitation—Rejection of application for joinder—R. S. C., O. 16, R. 2.

O. 16, R. 2 of the Supreme Court Rules provides as follows:—"Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Judge may, if satisfied that it has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just."

Held, that the Court should refuse an application for adding a person as party where the remedy in his favour has already become barred by the Statute of Limitations.

SLINGSBY *v.* DISTRICT BANK, LTD., (1932) 1 K.B. 544 (C.A.).

Banker and Customer—Material alteration of cheque—Payment made negligently—Liability of Bank—Drawer leaving space after payee's name—Conduct whether amounts to negligence—Bills of Exchange Act, Ss. 60, 64, 79 and 80.

The plaintiffs, who were executors of a will, had as their Solicitor a firm *C & P*. *C* and his clerk from time to time drew forms of cheques for the executors in favour of a named payee. In some of the cheques there was a blank after the name of the payee. In one such cheque *C* fraudulently inserted after the name of the payee the addition per *"C & P"* and after having it endorsed for *C & P* had it cashed. The plaintiff sued the Bank to recover the amount paid.

Held, that the cheque having been "materially altered" and the payment having been made owing to the defendant's negligence, the plaintiffs were entitled to recover.

Held, further, that the plaintiffs were not disentitled to relief on account of their failure to draw a line in the blank after the payee's name, such a thing not being a "usual precaution."

Decision of Wright, J., in (1931) 2 K.B. 588 affirmed.

KOFFMAN *v.* SUNSHINE, (1932 1 K.B. 606.

Practice—Order as to costs—Costs incurred in Lower Court—Power of High Court to award—County Courts Act, 1888, *S.* 131.

Section 131 of the County Courts Act, 1888, contains a clause to the following effect: "and in any event the High Court may make such order with respect to costs as it shall seem fit."

Held, that the High Court could pass an order as to costs under the section not only as regards costs incurred before it, but also as regards costs in the County Court.

REX *v.* ALEXANDER MURRAY, (1932) 1 K.B. 599.

Criminal Law—Habitual criminal—Conviction in Scotland—When can be taken into account in England.

In order that a conviction in Scotland on indictment for a crime shall be admissible in England as proof that a person is a habitual criminal, the offence for which the man was convicted on indictment in Scotland must also be a crime in England.

THOMPSON *v.* TRUST AND LOAN COMPANY OF CANADA, (1932) 1 K.B. 517 (C.A.).

Income-tax—Double taxation—Finance and Loan Company—Purchase of treasury bonds cum *coupon and sale ex-coupon—Interest received after deduction under Schedule C, Income-tax Act,* 1918*—Liability to assessment under Schedule D as part of Company's assets.*

A company which carried on business as a loan and finance company had in the course of that business dealings in stocks. shares and securities. During the year in question the Company had entered into a number of transactions for the purchase *cum* coupon and sale ex-coupon, of Treasury Bonds. On every day on which a contract to buy bonds *cum* coupon was made, a contract was also made with the same broker to sell bonds of the same nominal value ex-coupon. Each of the two corresponding buying and selling contracts fixed the same date for settlement and the purchase was completed by delivery of bonds with coupons attached. The Company subsequently cashed the detached coupons and received interest less income-tax deducted under Schedule C of the Income-tax Act, 1918.

Held, that the net interest received by the Company on the bonds, having been taxed under Schedule C, could not again be taken into computation for the purpose of assessment of the Company to income-tax under Schedule D.

Decision of Rowlatt, J. in (1932) 1 K.B 283 affirmed.

REX *v.* JUDGE LAILEY. *Ex parte* KOFFMAN, (1932) 1 K.B. 568.

Jurisdiction—Court vested with powers over partnership actions —Suit for declaration of partnership—Defendant's denial of partnership—Jurisdiction if ousted—County Courts Act, 1888, *S.* 67 (7).

Section 67 (7) of the County Courts Act, 1888, provides that the County Court shall have all the powers of the High Court in actions and matters for the dissolution or winding up of any partnership in which the property shall not exceed £500.

Held, that an action for a declaration of partnership and an account could be maintained in the County Court, even though the defendants might plead that there was no partnership between the plaintiff and themselves.

MONTAGU STANLEY & CO *v.* J. C. SOLOMON, LTD, (1932) 1 K.B. 611.

Principal and Agent—Contract of indemnity—Agreement to share profits and losses—Suit to recover loss sustained but not paid—Maintainability.

The defendants who were stock-brokers entered into an agreement with the plaintiffs, another firm of stock-brokers, to the following effect: "In consideration of plaintiffs paying J. C. Solomon, Ltd., fifty per cent. of any commission received on business introduced by them as agents the defendants should be liable for fifty per cent. of any loss sustained in connection with such business." In respect of a particular transaction so introduced, the plaintiffs sustained a loss but no part of it was paid The plaintiffs having sued to recover the share of the loss,

Held, that the contract was one of indemnity and not in the nature of a *del credere* agency and that the plaintiffs could not recover except on showing actual loss.

JOTTINGS AND CUTTINGS.

A Judge's Bias.—His Honour Judge Higgins, at Brentford County Court, called attention to the curious operation of our law —far more interesting, one thought, than the lengthy observations of McCardie, J., on the right of married women to go away for week-ends. *A,* or *A* and *B,* form a limited liability company and go into liquidation. *A* or *A* and *B* may be men of wealth, but the company is liable only to the extent of its liability as limited by shares, and the creditors may declare in vain that the one man who really is the company ought to pay. Solomon's case decided otherwise. Judge Higgins declared that he was biased against that law.

He declared further that, personally, he was against the person who, having gambled and lost, pleaded the Gaming Act against an honest bookmaker: and most Britons will agree with him, even

those who deplore gambling, and believe, on the whole, in companies whose liability is limited by shares and that the persona of a company is wholly different from that of the one or two persons who have complete "control".—*L.J.*, 1932, p. 240.

Lord Macmillan on Scots Law.—A little book recently published under the title "A Scotsman's Heritage," consisting of a number of papers by different hands on various aspects of Scottish character and Scottish institutions, contains one on Scots law from the competent pen of Lord Macmillan, who knows his subject as few other living writers do. Within the compass of twenty pages he brings out with striking effect the salient features of the law of Scotland, and traces the reasons why it has differed on so many points from the law of England. The two main reasons for the persistent survival of Scots law as a system are, as he points out, deeply rooted, one of them historical, the other temperamental. Historically, a secular hostility existed between England and Scotland during the formative period of the institutions of the two countries. Scotland's sympathies for centuries were with the Continent, rather than with what was known as the "auld enemy" on its southern border. To the Continental universities Scots lawyers went for their training in the civil law, a practice which continued till towards the end of the eighteenth century. Boswell, it may be remembered, went to Utrecht to sit at the feet of one of the great civilians. At that time, too, the Scots reports show, by the frequency of citations from the Continental writers such as Pothier, Voet, Bynkershoek, Puffendorf, and others, how the Scots Bench and Bar turned to the Continent for instruction in legal principles. The temperamental reason for the distinction between the two systems of jurisprudence Lord Macmillan explains by saying that the law of Scotland, to a far greater extent than that of England, is founded on logical deduction from principles, and he quotes from a letter written by Lord Dunedin to *The Times* some years ago, in which he said that the fundamental difference between the common law of England and that of Scotland lay in this, that in England you have to find the remedy in order to discover the right, whereas in Scotland you have to find the right in order to discover the remedy. This view was also that of Maitland, who said that "in order of logic right comes before remedy; there ought to be a remedy for every wrong."

Having touched on these fundamental divergences, Lord Macmillan calls attention to several branches of law in which Scotland still maintains its own distinctive features, particularly the law of the domestic relations and the land laws. As is pointed out, and as, indeed, is generally known, the Scottish law of marriage, "to the benefit of inaccurate southern writers of fiction," continues distinct from that of England, although it is far from being the casual code which it is often represented as being. It rests, as Lord Mac-

millan says, on the simple principle that marriage is a consensual contract, and that persons who have entered into it, like persons who have entered into any other kind of contract, are bound by it; but again, like any other kind of contract, the agreement to enter into it must, if disputed, be duly proved. Again, in the matter of divorce, the spouses in Scotland have always been on an equality, and, further, the wife has rights of succession to a share of the husband's estate which cannot be defeated Turning next to the subject of the land laws, attention is called to the early recognition by Scots lawyers of the advantages of registration. In other matters French influence has been evident, notably in legal nomenclature. Thus the name "advocate" in place of barrister has obtained, and the head of the Bar is the Dean of Faculty, who, like the French *batonnier*, is elected by his brethren, and has as a symbol of office a silver-mounted ebony baton. As to Scottish legal terms, Lord Macmillan admits that "multiplepoinding" and "souming and rouming" have a quaint and fantastic sound, but asks if they are more barbarous than "*cestui que trust* or "*autrefois acquit*". "Assoilzie," as he adds, is good Norman French, and "avizandum" should not seem strange to readers of the English reports where the mysterious abbreviations "*cur. adv. vult*" embody the same verb in the infinitive mood. The whole paper is charmingly writtten, and should not be neglected by anyone who wishes to know something of the law of Scotland.—*L T.*, 1932, p. 245.

Lord Dunedin and R. L. Stevenson.—In view of the important role which Lord Dunedin has played for so many years in the sphere of law we naturally think of him as a great judge and nothing more, great though that role has been It may be interesting then to recall that in his early days he came into personal touch with Robert Louis Stevenson. Both were members of the famous Speculative Society of Edinburgh University, and some years ago Lord Dunedin recalled that he was present at a meeting of the society (of which, by the way, Sir Walter Scott was secretary at an earlier period) when Stevenson made his maiden speech Speaking of the members of the society of that generation the late Lord Guthrie said, as to their probable chances of success in life, that his prophecy would have been the short-sighted one: "Graham Murray (Lord Dunedin) and Louis Stevenson are the cleverest men amongst us; brilliant fellows both of them. But then each is the only child of well-off parents; they are far too well provided for. Besides, neither of them has the iron physique necessary for distinction at the Bar. Anyhow, they are altogether too casual to subject themselves voluntarily to the slavery which eminence demands." Those two, it is added, were the only members who were destined, each in a different sphere, to attain renown. Both were called to the Scots Bar, but ill-health drove Stevenson far

from Scotland; nevertheless, although he and his contemporary, Graham Murray, were separated by the width of oceans, the latter's intimate knowledge of Scots law and procedure were to be placed at the disposal of his friend in his literary work. When Stevenson, with failing health though with unabated courage, was writing the early chapters of what, if finished, would have been his greatest book, "Weir of Hermiston," he was faced with a legal problem in Scots criminal procedure which the limited library equipment of far-off Samoa provided no means of solving by himself. Writing home and stating his difficulty, the matter was placed before his old contemporary of the Speculative and the Parliament House, who by this time was Solicitor-General for Scotland, and he at once gave the requisite information. Stevenson was very grateful and wrote that "Graham Murray's note *re* venue was highly satisfactory, and did me all the good in the world." In this interesting fashion Lord Dunedin's name is linked with the story of "Weir of Hermiston."—*L.T.*, 1932, p. 245.

The New Judge.—The vacancy in the King's Bench Division created by the resignation of Mr. Justice Rowlatt, who retires after twenty years' service on the Bench, with the affectionate good wishes of the whole profession, has been filled by the appointment of Mr. Rayner Goddard, K.C. The announcement of his selection confirmed the general expectation, and will be received with complete approval. Mr. Rayner Goddard, who is fifty-five years of age, was educated at Marlborough and Oxford, and was called to the Bar in 1899. As a junior, he was in great demand, and he has been equally successful as a leader since he took silk in 1923. Heavy and complicated cases were his particular *forte,* and he was a familiar figure in the Commercial Court. Since the death of the late Mr. Alexander Neilson, K.C., he has also frequently appeared on behalf of members of the medical profession in cases which have involved the acquisition—at least temporarily—of an intimate knowledge of medical and surgical details. Mr. Goddard, who was Recorder of Poole from 1917 to 1925, of Bath from 1925 to 1928, and of Plymouth from 1928 until his appointment to the Bench, has also recently acted as Commissioner of Assize. The profession confidently hopes and expects that a distinguished forensic career will be followed by an equally distinguished tenure of the judicial office.—*L.J.*, 1932, p. 247.

Lotteries.—The introduction of the Bill on this subject on the eve of the adjournment for Easter raises one of those questions, of which in these times there are not a few, inviting criticism alike on legal, ethical and religious grounds. The subject opens up possibilities of terminological debate at every point, and not least so as to

the very ambiguous frontier separating a gamble from the ordinary commercial risk. The whole matter has been brought before the public notice of late through the activities of the Irish Sweepstake. It may be a common ground for congratulation on the part alike of those who approve and those who deprecate lotteries that the Bill should give some opportunity for seeing what legislation would involve. Those who deprecate such enterprises may have the additional satisfaction of knowing that there is no likelihood of its being passed during the coming months. The debate has shown some interesting historical facts. Lotteries have in the past repaired havens, started the British Museum, erected the Old Westminster Bridge and so forth. On the other hand an Act of 1541 checking lotteries did so on the ground that the State was endangered by betting; in 1698 another check was imposed, and the Act of 1823 was the result of the report of a committee which declared the lottery to be radically vicious. There was one statement in the speech of Sir W. Davison, who introduced the Bill, which is at the very least a gross exaggeration. He spoke of there being "scarcely a church or chapel bazaar in this country which did not hold its little raffle." There would have been twenty years ago some justification for this sort of allegation, but in gatherings of clergy and laity very strong views as to them have more recently been expressed, and they are to-day rare and deprecated. There is much force in the argument that the present state of the law, which frowns on the lottery and smiles at the totalisator, which welcomes the post office receipts arising out of betting transactions while it searches the letters of private individuals (including those of solicitors to their clients) lest they should be too deeply concerned in the Irish Sweepstake, is at least contradictory, and that an inquiry into the whole subject-matter might be useful as establishing some sort of intelligible and workable principle. The speech of Mr. R. H. Morris for the rejection of the Bill brought out at any rate one very practical consideration, assuming that his figures were accurate. If so, they suggest that the benefits alleged to enure to hospitals from sweepstakes are less than have been supposed. Some thirteen millions pounds were raised last year, by bequests, subscriptions and patients' gifts. The figures of the Irish sweepstakes indicate that no such sum could be raised in a year, and furthermore, it is alleged that annual subscribers are already withdrawing their aid from the Irish hospitals.—*L T*, 1932, p. 265.

The Bill.—Taking all these arguments, pro and con, into consideration, legislation on the lines suggested by Sir W. Davison requires much more information before it can safely be passed into law, and probably should be sponsored by the Government if its principles are affirmed. The present Bill is wider in its terms than

that introduced by him last year, for it would authorise money being raised for charitable, scientific and artistic purposes or any public improvement or other public object. It empowers trustees of these bodies to hold lotteries subject to the approval of the Secretary of State and in pursuance of a scheme so approved. As already indicated, there is little likelihood of the Bill making much progress in the immediate future. It has, however, now on two occasions been presented to Parliament, and it would be well if its implications and probable effects were weighed carefully and not least so by those who. being engaged in social work, know best how these things would affect the home lives of the people —*L.T.*, 1932, p. 265.

Mr. Justice Wightman.—In one of Mr. Augustine Birrell's essays there is a pleasant story of Mr. Justice Wightman being discovered out of term one very cold day gloating over a large fire and the "Life and Letters of Mrs. Hannah More." Being old-fashioned perhaps accounts for the particular literary work on which he was then engaged, but the story recalls to us that Wightman was one of the members of the judiciary with interests outside the confines of the law. Of this we are also reminded by the fact that he astonished Lord Campbell, when they were journeying the Northern Circuit together, by displaying stores of literature "for which," said Campbell, "I had never given him credit." Curiously enough, during the past week. the present writer, who remembered little of the distinguished judge save that he was the father-in-law of Matthew Arnold and that the latter frequently acted as Marshal to the judge, met in the course of his miscellaneous reading several pleasant anecdotes about him which, if they showed that, like other people, he had his little oddities, tended to virtue's side. Not unnaturally, he was very proud of the literary fame of his son-in-law, whom he was in the habit of introducing as "My son-in-law, Matt Arnold. Professor of Po-e-try at Oxford": Arnold reciprocated the esteem, and in one of his letters mentions that he liked to watch the judge trying cases, "he does it so admirably." It seems that one of the judge's peculiarities was to get hold of the menus of banquets and to go through each item of a Barmecide feast. "I should have twice of fish; I would take the entree but not the joint; I should have a large helping of duck, and two helpings of ice pudding"—quite a harmless and not altogether unpleasant form of literature; but in the sphere of gastronomy he did not content himself with conning the menus of bygone dinners, he kept an eye at times on that for his own delectation on circuit. We are told that once he took the precaution to visit the larder and inspect the fare provided for the judges and their clerks. A fine salmon reposed in one dish and some whiting in another. "Who are these for?" asked the judge. The attendant replied that the latter were intended

for their Lordships, and the former for their Lordships' clerks. "Oh, indeed," said the judge "well then, you'll be good enough to send that to their Lordships and those to their Lordships' clerks" As a judge he probably shared the view expressed by Lord Ellenborough that the court sat not to court argument but to endure it; but while that might be so, Mr. Justice Wightman invariably expressed himself without that irritability of tone so characteristic of Ellenborough. On one occasion we are told that Mr. Ribton, a noted advocate of a past day, was indulging in repetition even unto the third or fourth iteration. The judge mildly said, "Really, Mr. Ribton, you know, you've said that before." "Have I, my Lord? I am very sorry. I quite forgot it." "Don't apologise," said Mr. Justice Wightman, patiently stifling a sigh. "I forgive you, for it was a very long time ago." Could anything have been neater?—*L.T.*, 1932, p. 267.

A Patient's Refusal to an Operation.—At an inquest on a postman in Paddington recently, it appeared that the man had been thrice gassed in the War, with the consequence that, from time to time, he had to have hypodermic injections in the chest. On the latest occasion the needle broke, and the doctor, knowing of the danger, desired to remove it at once, but the patient objected. The next morning he again refused to allow of the operation, although the doctor pressed him to give his consent, and he died soon afterwards. At a post-mortem, the needle was found to have moved, and had slightly penetrated the lung. The man was in a bad state, and could not have lived long; but the coroner recorded his verdict that death was accelerated by the puncture of the lung, and added a rider that it should have been removed by the doctor. He observed: "I cannot help thinking that the doctor had listened too much to the patient and not to his own sense of duty. There are times when the patient's feelings shoud not dominate, and when it is the doctor's duty to insist." This reasoning may perhaps be sound, but the very difficult position of a doctor who does insist on operating in the face of the patient's positive veto is worth consideration. We discussed the matter generally in a note five years ago, 71 Sol. J. 110, quoting various cases, amongst others one before Lord Brampton as Hawkins, J. In that case the doctor was held justified in removing both ovaries when the patient had only given her consent to the removal of one, but on incision he found each so diseased that he deemed it necessary to remove both to save her life. When he made his decision, therefore, the patient was unconscious, and incapable of consenting, which was not the case here, for the consent was requested and refused. The legal dangers even of examining the body of a patient against his or her will are set forth at considerable length in Taylor's "Medical Jurisprudence," 8th ed., pp 59-69, and an operation is, of course,

more serious than a mere inspection. An operation performed in the face of the express veto of the patient, which was unsuccessful in its immediate object, but which the patient survived, would, it may be surmised, render the doctor who performed it liable to heavy damages in an action for trespass to the person. If a patient *sui juris* refuses to submit voluntarily to an operation, there is no legal authority to override him, nor is anyone liable if he dies as the result of such refusal. In the case of children, on the other hand, a parent may commit an offence by refusing to consent to a neces sary operation on a child, see *Oakey* v. *Jackson*, (1914) 1 K.B. 216, quoted in our previous note.—*S.J.*, 1932, p. 237.

The New Judge.—The translation—if we may borrow a word with an ecclesiastical flavour—of Mr. Jnstice Wright to the House of Lords, has been followed by the appointment of Mr. Geoffrey Lawrence, K.C., to be a Judge of the King's Bench Division. The appointment was fully expected—indeed Mr. Lawrence had been freely "tipped" for each of the last three vacancies—and it will be very popular. The new Judge joins the select and increasing band of sons who have followed their fathers from the Bar to the seat of judgment; at the present moment it includes Lord Russell of Killowen, Lord Justice Romer, Mr. Justice Finlay, Mr. Justice Charles, Mr. Justice Macnaghten, and Mr. Justice Farwell. The Hon. Geoffrey Lawrence is of course a son of Lord Trevethin, who was from 1904 to 1921, Mr. Justice A. T. Lawrence. and who for a short period was Lord Chief Justice, in succession to Lord Reading. Mr. Geoffrey Lawrence, who was called in 1906 and took silk in 1925, has been Recorder of Oxford since 1924 and has had a considerable practice on the Common Law side. He had a distinguished career in the Army during the War and was accorded the D. S. O. He goes to the Bench with the cordial good wishes of the profession.—*L.J.*, 1932, p. 265.

A Heinous Crime.—A correspondent writes: The popular press is always worth following—especially the evening press—not for its big stories, which are usually rather less than worthless, but for the little items that help the harassed "maker-up" to fill out a column. These unconsidered trifles throw all sorts of queer side-lights on the life we live to-day. We are indebted to the *Star* of April 6 for one that is peculiarly illuminating. A Hornsey shop-keeper was haled before the local bench. His crime hardly bears mentioning—*non nominandum inter Christianos*—but in a legal journal one need not mince words. At the risk of shocking our readers we will be quite frank. The fellow was charged with an offence that every high-minded bureaucrat must regard with loathing. *He had sold a tin of enamel on the afternoon of Early Closing Day!* But such is the depravity of the times that he actually had the impu-

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dence to plead (what in fact was true) that the commission of the offence had been deliberately procured by the prosecution by means of certain subtle crafts and devices, to wit, by inducing an obliging youth to knock at the defendant's back door and tell an ingenious fiction about the desperateness of his need for a tin of enamel. The tin of enamel was supplied. The needful evidence was obtained. The summons duly followed. The borough council inspector swore to the abomination. It will hardly be credited, but it is none the less true that this upright official, who was only doing his duty, *was actually cross-examined* by the defendant's solicitor, who had the effrontery to ask if the witness thought it part of the said duty "to procure and connive at a breach of the law." The witness's reply was admirable in its combination of dignity with humour. *"It is my duty,"* he said, *"to see that the Shop Hours Act is carried out."* We regret to have to add that the Bench showed a deplorable lack of appreciation of the inspector's zeal. In announcing that the summons was dismissed, the Chairman was almost rude.—*L.J.*, 1932, p. 267.

A Headmaster's Liability.—The Court of Appeal last week, in *Langham* v. *Governors of Wellingborough School and Fryer,* allowed the appeal of Mr. P. A. Fryer, the headmaster of the school, from the verdict and judgment in an action tried at Northampton Assizes, in which the plaintiff, a pupil at the school, claimed damages for injuries received from a golf ball hit by another boy. The plaintiff was passing an open door, carrying some books, when the ball came in from the playground and struck his right eye, the use of which he lost as a consequence. Playing with golf balls and other hard balls in the school precincts had been forbidden It seems that the ball was hit with an ordinary walking-stick, and evidence was given to prove that a golf ball had never been hit in the playground before. Counsel for the respondents urged that a golf ball plus a stick in the hands of a boy on a playground with an asphalt surface constituted a very dangerous combination. Lord Justice Scrutton, in giving judgment, said that for the plaintiff to succeed in such a case there must be evidence of some lack of supervision, and that the accident was caused thereby. In his opinion there was no evidence in the present case which could justify the finding that the headmaster had been negligent, and the case ought not to have been left to the jury.—*L.T.*, 1932, p 276.

Judges and the Privy Council.—While each Lord Justice on his appointment to the Court of Appeal is almost immediately sworn of the Privy Council, the like honour in the case of puisne judges is usually deferred till their resignation from the bench of the High Court. There have, it is true, been exceptions to this rule

in that one or two puisnes, during their tenure of office, have been created members of the Privy Council; this happened, for example, in the case of the late Mr. Justice Kekewich, as also in that of Mr. Justice (now Lord) Darling. Nowadays, the inclusion of retired judges in the Privy Council is little more than a graceful and well-deserved recognition of the services they have rendered to the country, although in some instances their further services have been requisitioned for the Judicial Committee. The late Sir Arthur Channell, for example, seemed never to tire of work, and so time and again, after he had resigned from the High Court bench, he was found giving assistance in the Judicial Committee of the Privy Council, his connection with which is memorable not only by the judgments, although technically that is not the correct expression, he delivered, but also pictorially by one of the illustrations in Sir Almeric Fitzroy's "History of the Privy Council," where he is seen sitting with Viscount Sumner, Lord Parmoor and Lord Wrenbury. In earlier days, however, before the judicial strength of the House of Lords was increased by the appointment of a larger number of Lords of Appeal in Ordinary, who thus became available likewise for the work of the Judicial Committee, ex-judges were frequently requisitioned to constitute a quorum of that tribunal. Apparently it was not always an easy matter to secure the requisite number of trained judges for the hearing of Indian and Colonial appeals, and more than once the Duke of Buccleuch, during his tenure of the office of Lord President of the Council, was commandeered to make a quorum. The Duke had to take part, a silent one it is true, in the hearing of an appeal relating to the will of a Hindu, which lasted four days, and he confessed that he did *not* relish the experience, although one of his judicial colleagues assured him that the Indian appellants would much rather have their cases decided by a great Scottish duke than by mere lawyers. Whether this little piece of flattery compensated him for his four days' boredom is not recorded.—*L.T.*, 1932, p. 285.

Political and Legal Pensions.—The proposal of the French Chamber of Deputies that ex-Presidents of the Republic should receive a pension is interesting as reflecting the feeling that those who have served the Presidential term should receive some recognition from their country for the services they have rendered. At one time in our own country the bestowal of pensions for political services (which usually consisted merely in voting steadily with the Ministry in office) was on a lavish scale. Burke inveighed against the system as it was in operation, and although his precise proposals for economy did not secure acceptance, they influenced shortly afterwards the curtailment of expenditure very considerably. At the present time a limited number of pensions for political services may lawfully be granted under the provisions of the

Political Offices Pension Act, 1869, the pension varying in amount according to the salary attached to the office in which the grantee had served. The applicant for such a pension is required, by virtue of sect. 6 of 4 & 5 William 4, c. 24, to state in writing the services in respect of which he makes the claim, and also to make "a specific declaration that the amount of his income from other sources is so limited as to bring him within the intent and meaning of this Act," that is, he must show the inadequacy of his private fortune to maintain his station in life. Apparently the *bona fides* of the statement as to the applicant's need of a pension has sometimes been investigated, for we are told that Mr. Gladstone had an unpleasant experience of the relations brought about by the refusal of a pension on the ground that the applicant's statement of his income was inaccurate: see Morley's "Life of Gladstone," Vol. III, p. 108. No pensions of this class are paid at the present time, the last holders having patriotically resigned them.

Legal pensions stand on a very different footing, for, while political pensions of the kind just referred to may be granted after only a few years' service in the particular offices, judges are required to perform their work (apart from earlier incapacity through ill-health) for fifteen years. In their case, too, acceptance of office usually means a marked diminution of income for which even the prospect of a pension at the end of fifteen years scarcely compensates. Moreover, ex-judges are frequently called upon to undertake public work gratuitously, and to their honour be it said, they ungrudgingly shoulder these extra tasks, and thus may be said to be earning their pensions concurrently with receiving them.—*L.T.*, 1932, p. 285.

Lord Buckmaster's Road Traffic Bill.—Lord Buckmaster's Road Traffic Bill was read a second time in the House of Lords on Tuesday without a division. Clause 1 proposes to abolish the distinction between criminal and civil negligence where a person is killed by the driver of a motor vehicle. The driver, if his negligence has caused the death, will be guilty of manslaughter. Under cl. 2, where the negligence causes only bodily injury, the driver will be guilty of unlawful wounding. Clause 3 imposes a five miles per hour speed limit on goods vehicles over five tons weight. The argument for the Bill was based on the appalling sacrifice of life and infliction of personal injury which motor traffic causes; during the last three years over 20,000 killed, and more than half a million injured. The House naturally agreed that this state of things cannot be allowed to continue, but the official view, as expressed by the Lord Chancellor—though we doubt whether it is his personal view—is that the present law is sufficient if it is enforced.—*L.J.*, 1932, p. 302.

Civil and Criminal Negligence.—The answer is that it is not enforced, largely because magistrates and juries take too liberal a view of civil negligence. Motorists who have killed by obviously culpable negligence. continually escape a verdict of manslaughter because the negligence is described as only civil. Objection also was taken to placing motorists under a special law of manslaughter. But, as Lord Buckmaster said in his reply, this distinction only recognises the special danger which motor traffic as now carried on causes. It may be that the Bill will not pass in its present form, but its favourable reception by the House makes it probable that the Government will be forced at length to recognise that their primary duty is the protection of life. That obvious truth has been forgotten in dealing with the development of motor traffic. Where death or serious injury is caused, there should no longer be the possibility of setting up the indefinite distinction between civil and criminal negligence. Lord Buckmaster's statement of the case, forcible without exaggeration—unhappily the facts speak for themselves—made it impossible for the House to condone the official failure to act, and secured the Second Reading.—*L J.*, 1932, p. 302.

Not Wholly Ineffective.—Du Parcq, J., ought not to worry overmuch at the failure of litigants to come up to the scratch on the testing day of trial. He observed recently that three common jury cases were on his list for trial. One or other of the parties failed to appear in each case. Two were disposed of and one adjourned. The Judge thought it was "lamentable, with hundreds of actions waiting to be tried, which had necessitated the appointment of an additional Judge, that the daily Cause List should contain so many ineffective cases. Solicitors, being officers of the Court, should take the trouble to inform the Associates if there were any doubt about their cases being effective, so that others might be added"

This is sound sense; but who can say if the solicitors are to blame? An "ineffective" case may have become so because the lay client at the last moment lost his nerve for fighting. And many a litigant who would be willing enough to take his chance with an uncertain case before one Judge might not so readily appear before another. And if it be true that Du Parcq, J., has already acquired such a reputation for discernment as to send the man with the weak case to cover, he has done well, and satisfactorily disposed of his daily portion. He is entitled, in my submission, to rise early and depart as many another good Judge has done before him. Every day will not be like that.—*L.J.*, 1932, p. 312.

The New Procedure Rules.—The Rule Committee have now, after due deliberation, but without anything like undue delay, formulated rules, "framed on the analogy of the Commercial Court,"

which are to apply to such King's Bench actions as are suitable for the abridged procedure thereby constituted. They are to come into operation on the 24th inst. A helpful and readable memorandum accompanies these "New Procedure Rules," and this, together with the rules themselves, will be found in another part of this issue (*post*, p. 354). Henceforward actions pending in the King's Bench Division will appear in either the "new procedure list" or the "ordinary list," but actions in which fraud is alleged by the plaintiff, and those for libel, slander, malicious prosecution and so on, in which the parties are entitled to a jury as of right, can never find a place among the new procedure actions. If satisfied that an action is one to which the order can apply and that it is not by reason of its complexity or otherwise unsuitable, the plaintiff's solicitor may claim at the outset that his client's action is "fit for the new procedure," while a rule to be inserted in Order XII dealing with appearance, empowers the defendant's solicitor at a later stage to insert in his memorandum and notice of appearance a certificate that the action is so fit and thus secure its transfer. There seems to be no provision to secure inclusion in the new list at any other stage, whether by consent or otherwise. Solicitors will thus have to shoulder a considerable burden of responsibility, both to their clients when advising, and to the court when certifying, but as the memorandum says, they are officers upon whom the court relies, and their assistance in the initial stage of litigation will be welcomed to ensure that the new list is not burdened with unwieldy cases. A mistaken inclusion in the new procedure list can, if it comes to light, be rectified by the judge on the hearing of the summons for directions.—*L.T.*, 1932, p. 335.

BOOK REVIEWS.

SARKAR ON EVIDENCE, Fifth Edition, by S. C Sarkar. Price Rs. 16

We have great pleasure in acknowledging the receipt of the fifth edition of this work. For some years, this book has been looked upon as the leading commentary on the Indian Evidence Act, being the most exhaustive treatise on the subject. It is therefore necessary only to notice the additional features of the present edition. The text has been in many places re-written with reference to latest decisions and a large number of new cases have been added with the result that the volume has grown by the addition of nearly 200 pages over the last edition. This will certainly add to the usefulness of the book as a book of reference. It is only fair to add that it has become almost a necessary book of reference to every lawyer and judge.

LECTURES ON CONTRACTS, by Mr. T. S. Venkatesa Aiyar, M A., M.L., Advocate, Madras. Printed at the Royal Printing Works, Mount Road, Madras.

This is a unique work of its kind on the Law of Contracts. There are excellent treatises treating of the English Law of Contracts and there are valuable commentaries on the Indian Contract Act. The work under review combines the advantages of both and has the additional merit of being useful to the students of law, as well. The learned author has, in his long course of experience as professor of Law, come into contact with students and their difficulties in understanding the subject. He has also from his practice at the bar realised the needs of the profession. In his lectures, which form the bulk of this part, he has dealt the subject in its natural order of treatment giving a comparative study of the English and Indian Law. The principles underlying the various topics have been clearly set out with reference primarily to the English Law and the differences in Indian Law are referred to in their appropriate places. The leading English decisions up to date are referred to and the principles are stated almost with the language of the eminent Judges in England. In elucidating the principles, the learned author has given his suggestions and offered criticism on the various topics wherever needed. The second portion of this volume is devoted to giving a commentary of the first seventy-five sections of the Indian Contract Act with the English and Indian decisions. The Indian case-law on the subject is given under the several sections and references are given for a discussion of the principles to the lectures portion of the book. With a view to illustrate our observation that the principles and history of the law have been stated with clearness and thoroughness, we would only draw attention to the treatment of consideration in the lectures portion where the author has put together valuable information gathered from various sources and not found in any one single work. We have no doubt that with the appearance of the second part dealing with the special branches of the Law of Contracts, such as the Sale of Goods, Indemnity and Guarantee, Bailments, Agency and Partnership, we shall have a self-contained work on the Indian Law of Contracts.

THE INDIAN REGISTRATION ACT, by K K. Vaidya, M A., LL.B, Solicitor, High Court, Bombay. Second Edition, 1932. Price Rs. 3-8-0.

The numerous recent amendments to the Indian Registration Act by the Transfer of Property Act and other enactments have called for the second edition of this book. The effect of the amendments has been noted in their proper places and the case-law has been brought up to date. We have no doubt that with

the useful appendices giving the provisions of analogous enactments and the fees rules of the various provinces, the book will be found a handy and reliable guide to the members of the legal profession as well as to Registration officers.

THE INDIAN PARTNERSHIP ACT, 1932, by R. Narasimhachariar, B.A., B.L., Advocate, Madras. Published by the Law Publishing Company, Mylapore, Madras. Price Rs. 2-8-0.

This edition of the Partnership Act which comes into force on 1st October, 1932, will be welcome to legal practitioners and businessmen who desire to make themselves acquainted with its provisions. The enactment is a short one and the book is naturally small. We find collected under each section the leading English and Indian cases on the subject. The remarks of the Special Committee which was composed of eminent lawyers are also reproduced in their suitable places. There is a comparative table at the beginning of the book giving reference to the corresponding provisions of the English Partnership Act and the Indian Contract Act and the appendices give the sections of these Acts *in extenso*.

PRINCIPLES AND PRACTICE OF COMPANY LAW, by S. M. Sen, M.A., B.L., and A. K. Banerjee, M.A., B.L., Advocates, High Court, Calcutta. Price Rs. 6.

The subject of Company Law is one of practical interest to businessmen and a knowledge of it is therefore essential to them; but a study of the Act itself is not likely to be of much profit to them by reason of their unfamiliarity with the modes of legal expression. The present book which treats of the subject in the form of chapters dealing with each topic in its logical order will be found more easily intelligible to them. The leading cases are, however, referred to and the Act itself is given after the exposition of the subject in the shape of chapters. The appendices give useful information on allied topics. We believe the book will be found of assistance particularly to students of law and businessmen.

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FOREIGN NATIONALS AND INTERNATIONAL LAW.*

BY MR. B. SITARAMA RAO.

(*Continued from Vol. LXII, page* 90.)

Right to intervene of States on behalf of their nationals. —The right of States to intervene on behalf of their subjects and the principles governing such intervention are thus laid down by the Permanent Court of International Justice in a case that arose between Great Britain and Greece.[1] "It is an elementary principle of international law that a State is entitled to protect its subjects when injured by acts contrary to international law committed by another State from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law. The question whether the dispute originates in an injury to private interest which in point of fact is the case in many international disputes is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter, the State is the sole claimant. The State does not substitute itself for the subject

*This is the second of a series of three lectures delivered in pursuance of "The Krishnaswami Aiyar-Sundara Aiyar Lectures Endowment". It owes its existence to the munificence of Sir Alladi Krishnaswami Aiyar who started it in memory of the two great lawyers whose name it bears. According to the conditions of the Endowment, the lectures have to be on a subject connected with public International Law.

1. Publications of the Court Series A, No. 2, p. 11, 1930 Y. B., p. 6.

and consequently factors foreign to the previous discussions between the individual and the competent authorities may enter into the diplomatic negotiations." In other words, the parties to such a dispute are the two States. The claimant State claims for an injury done to itself in the person of its national and it must establish in order to succeed a breach of international law. As further elaborated in a case between Germany and Poland,[2] "the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law. The reparation due by one State to another does not, however, change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The damage suffered by the individual is never identical in kind with that suffered by the State; it can only afford a convenient scale for the calculation of the reparation due to the State."

In order to justify an award on a claim in respect to an injury to a national it is essential that the person injured must be at the time of the injury a national of the claimant State and not of the respondent State and he must continue to be so at the time the claim is lodged and up to the time of the award. If it so happens that in the interval he ceases to be a national or he dies and his representative is not a national of the claimant State or is a national of the respondent State the claim fails. If some of the representatives alone are nationals of the claimant State only a proportionate amount can be awarded.

Though it is true that the remedy involved in these modes of approach are only for breaches of international law, there are other modes of resorts for breaches of international proprieties, *e. g.*, unfriendly acts like wholesale discrimination against nationals, namely, diplomatic insistence and on failure retortion or reprisal.

A certain school of international jurists, to whom we have already referred, of whom Bluntschli, Martens Fiore and Fauchili are among the most important, maintain that the law of nations guarantees every individual at home and abroad certain so-called natural or fundamental rights and such rights are said to be (*i*) the right of existence,

2. Publications of the Court Series A, No. 17, p. 26.

(*ii*) the right of protection of honour, life, health, liberty and property, (*iii*) the right of practising the religion of one's choice, (*iv*) the right of emigration, and (*v*) the right of entry into other States for all lawful purposes. The doctrine of fundamental rights is not accepted by Oppenheim and others. As regards some of these, the Committee of Jurists appointed by the League of Nations to study the question of codification report as follows : "Some rights are not rights created by States for the benefit of their nationals or of foreigners, namely, the right to life, the right to liberty and the right to own property. The community has simply recognised the existence of these rights and States have mutually undertaken to ensure the possibility of enjoying them. In fact, wherever a man goes, he takes his rights with him and wherever he is, it is the will of all States that these rights should be safeguarded." This is hardly distinguishable from the doctrine of fundamental rights of Bluntschli, though the categories are fewer. This is stated to be the minimum which a State should accord to foreigners in its territory. On the question as to how far the right to property goes, whether and if so to what extent international law forbids the application of measures conflicting with the principle of respect for vested rights and how far a State with a view to putting into operation some new or social economic policy may deprive persons of rights of property which they enjoy without awarding them adequate compensation, there is considerable divergence of opinion. We have already referred to the provisions in the treaties after the Great War and the provisions in the covenant of the League of Nations with a view to extracting therefrom a rule as to the minimum that is required to constitute civilised treatment. "International law," says Hall, p. 59, "is a product of the special civilisation of modern Europe and is intended to reflect the essential facts of that civilisation so far as they are fit subjects for international rules. Among these facts is the existence in almost all States of a municipal law, consonant with modern European ideas and so administered that foreigners are able to obtain criminal and civil justice with a tolerable approach to equality as between themselves and the subjects of the State. International law, therefore, contemplates the existence of such law and such administration and a State, professing to be subject to international law, is bound to furnish itself with them. If it

fails to do so, either through the imperfection of its civilisation or because the ideas upon which its law is founded are alien to those of the European peoples, other States are at liberty to render its admission to the benefits of international law dependent upon special provision being made to safeguard the person and property of their subjects. It is on this principle that capitulation and the extraterritorial privileges of European nationals are justified. It is on this principle that States are held liable for failure or denial of justice in their Courts in respect of foreigners.

Capitulations.—At various times from 1535 to the present century arrangements called capitulations were entered into with Turkey by various States the effect of which was to withdraw foreigners from the jurisdiction of Turkish Courts. Turkey was then outside the pale of international law. In 1856 by the treaty of Paris she was brought within the pale. Nevertheless, the extraterritorial privileges continued by reason it was said of her institutions not being in reasonable harmony with those of European countries. In 1914, Turkey by a unilateral Act renounced the capitulations. The Powers protested. The Great War intervening, no further discussions took place. By the treaty of Lausanne, 1923, the capitulations were abolished. Germany renounced them in 1917, and Soviet Russia in 1921. As a condition of the treaty of Lausanne, Turkey was willing to have an investigation into the judicial system of the country by a body of neutral lawyers. Non-nationals have now free access to Turkish Courts. In matters of marriage, divorce, wills, guardianship, succession on death and family law for non-Moslem nationals of the allies, the national tribunals established in the country of the party whose personal status is in question will alone have jurisdiction. The parties, if they think fit, may submit to Turkish Courts.

In Japan the extraterritorial privileges conferred on foreigners when the country was thrown open to foreigners were given up by Great Britain in 1899.[3]

In Siam, so far as British subjects were concerned, the exercise of extraterritorial rights was governed by a treaty of 1855. By a treaty of 1883 a special Siamese Court was established for the purpose. In 1909, this system was terminated on the coming into force of Siamese Codes and British subjects were

3. (1895) A. C. 644.

placed under the jurisdiction of the Siamese Courts. In 1920 the United States by a treaty agreed to relinquish her privilege on the coming into force of a series of judicial codes in five years. Germany and Austria relinquished them by the treaties of Versailles and St. Germaine.

In Persia, they ceased in 1928 but subject however to certain safeguards. As regards China, a resolution was adopted by the United States, Belgium, the British Empire, France, Italy, Japan, the Netherlands and Portugal at the Washington Conference agreeing to appoint a Commission to investigate and report on the possibility of relinquishing extraterritorial privileges. By their report in 1926 the Commission recommended the eventual abolition of the privileges but by reason of the political condition of the country the recommendations are in abeyance. Britain was prepared for a "sympathetic adjustment of treaty rights to the equitable claims of the Chinese". Several countries have already agreed to renounce the rights. Germany lost it by the treaty of Versailles, Austria-Hungary by the treaty of St. Germaine, Russia by a declaration in 1921 and later by a formal agreement in 1924. Again, in 1908, China denounced the protege system by which great extraterritorial powers claimed and exercised jurisdiction over subjects of lesser ones and in consequence the practice was relinquished. China also protested against the grant of nationality to Chinese people and Chinese companies by extraterritorial powers. Belgium also entered into a treaty in 1928 agreeing to submit to local and national jurisdiction in 1930 on some arrangements coming into force, in the event of the majority powers agreeing to do so. Spain also entered into a similar treaty in 1929. Italy entered into a treaty in 1928 postponing surrender of extraterritorial rights till other Powers agreed in accordance with Washington Conference recommendation. Portugal agreed to renounce from 1930. Japan and France have not yet agreed. The abolition of these treaties which is denounced as "unequal" treaties looms very large in the policy of the Chinese Government to-day. As it is, 16 countries including Great Britain exercise jurisdiction over their own nationals in their own Courts which are independent of the Chinese Ministry of Justice. The British system is full and provides for provincial Courts, a Supreme Court at Shanghai and a full Court acting as a Court of Appeal from all the Courts with appeals

in some cases to the Privy Council. These Courts are in the eye of the law really territorial courts exercising delegated jurisdiction. That is the view taken by the Privy Council in *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*[4] and, as a result, the land laws of China have got to be administered by these Courts and the Chinese law cannot be regarded as foreign law. China herself concurrently with the old system of Courts which seem to be unsatisfactory has a modern system of Courts presided over by lawyers educated abroad which seem to be quite satisfactory. Under this system there is a Supreme Court at Peking, a High Court in each Province and a District Court in each District. There is a complete code of civil and criminal procedure governing the procedure of these courts. But foreigners naturally prefer their own Courts. But it is difficult to delay the happening of what has already taken place in Japan, Siam and Turkey.

In Egypt, extraterritorial jurisdiction is exercised in a somewhat different way owing to the establishment of international tribunals called mixed courts. In civil and commercial matters and for some police offences, most foreigners in Egypt are subject to the jurisdiction of the mixed courts while as regards other criminal matters they are subject to the jurisdiction of their own consular courts. Abyssinia, China, Egypt, Morocco, Koweit, Muscat and Bahrein are only places where these extraterritorial privileges survive.

State Liability for action of State authority.—The first article of the resolution of the Institute of International Law declares that a State is responsible for damage caused to foreigners by any act or omission which is contrary to international obligation on the part of any State authority, be it constitutional, legislative, governmental, administrative or judicial. The American-Mexican Mixed Claims Commission, 1926, in the Neer case[5] (October 15, 1926) without attempting to lay down a precise formula, expressed the opinion "that the propriety of governmental conduct should be judged by international standards and that in order to constitute an international delinquency the treatment of an alien must amount to an outrage, to bad faith, to wilful neglect of duty or to an insufficiency of governmental action so far short of international standards that every rea-

4. (1901) A. C. 373. 5. (1927) 1 Y. B. p. 183.

sonable and impartial man would readily recognise its insufficiency. Whether the insufficiency results from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial." In the case of *Faulkner*[6] (November 2, 1926), the Commission allowed compensation where an American had been arrested and kept for some days in a Mexican house of detention under intolerable circumstances of indignity and inconvenience; in the case of Roberts " for unreasonable delay in bringing the arrested man before a Mexican tribunal " four months being the maximum period allowed by the Constitution of Mexico while in this case seven months had elapsed; in Youman's case for lack of due diligence in punishing perpetrators of mob violence; in Quintanilla's case for not accounting for the prisoner who was killed when in custody, it not appearing by whom he was killed, whether by the mob or the custodian. It was held to be a denial of justice "when there had been unnecessary delay in the trial, the accused had not been informed of the charges and was not confronted with his accusers and the hearings in the open court had been mere formality lasting only five minutes the whole procedure disclosing a want of seriousness in the Court." Similarly failure to prosecute the accused charged with offences against foreign nationals, granting of amnesty to the offenders, allowing the guilty party to escape from prison and failure to apprehend him subsequently and great delay in proceedings have all been held breaches of international duty. The existence of mere irregularities in the trial of an accused when they are matters of form rather than of substance does not necessarily constitute denial of justice. The trial of a man three times in succession, when there was a probable cause to justify prosecution and the evidence was insufficient to show that the Mexican law had been maliciously applied was held not to amount to a breach of international requirements. It was contended by the American counsel in one case that the detention of the accused in the absence of the establishment of *corpus delicti* was not justifiable under the Mexican law and the detention in those circumstances afforded a cause of action but the Court was of opinion that such a statute would be contrary to international law since it might interfere

6. (1927) Y. B. 184.

with the duty of a State in the discharge of its primary duty of administering justice[7] and its breach could not afford a cause of action. In another case, the Mexican Government was held liable for laxity and inadequacy of punishment for the murder of an American citizen. When though the accused had confessed the guilt, the Court refused to issue arrest warrants and only after a long delay the accused were tried and sentenced to a term of 5 years' imprisonment. The Commission held that the laxity shown by the authorities was only partially redressed by the punishment finally imposed. In the case of Chase[8] the United States was awarded 5,000 dollars damages for the failure of the Mexican authorities to try and punish a Mexican national for having seriously wounded the claimant. The assailant was arrested but was released on a bond in 1914 and was never brought to trial. The Commission expressed the opinion that " international justice is not satisfied if a Government limits itself to instituting and prosecuting a trial without reaching the point of defining the defendant's guilt and assessing the proper penalty." In the case of Way, the United States was awarded a sum of 8,000 dollars for the denial of justice resulting from the unwarranted conduct of a Mexican inferior judicial officer. He had issued a void warrant for arrest of an American to two men who shot and killed the accused. The Judge along with two others was tried and convicted. The Judge who was considered the principal party was however let off within a year which the American Government contended was a wholly inadequate mode of dealing with the offence. The Mexican State contended that it was not responsible for the acts of minor officials like the Judge in question. The Commission held that a State is responsible for the acts of its minor officials whether judicial or otherwise if it results in failure of a nation to live up to its obligations under the international law. In another case (Dyches) the United States was awarded compensation of 8,000 dollars on the ground that an American national was kept in detention for over a year pending trial when the maximum punishment for the offence was only a year as ultimately decided by the Supreme Court though he was convicted by the Lower Courts to a sentence for over 6 years. The Commission held that though the

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7. (1930) Y. B. 226.

8. (1930) Y. B. 223.

Supreme Court having corrected the error, it would in ordinary cases not have amounted to a denial of justice in the particular case, the long and unreasonable delay of the proceedings in a simple case brought it within the rule especially when taken along with the maltreatment of the accused in jail which was proved in the case. These opinions on the facts can hardly be taken to be decisive so far as general international law is concerned as the terms of the reference did not require the Commission to confine itself strictly to international law and also having regard to the unsettled conditions in Mexico which prevented the application of the rules of international law governing States with normally efficient systems of administration, judicial and otherwise.

Some distinction is sought to be made between judicial and legislative bodies of the State and the administrative or executive and that while the State might be liable for the latter should not be made liable for the former. The present tendency of juristic opinion is reflected in the resolution of the Institute of International Law at Lausanne extracted above. But this view does not exclude the distinctions made by Hall between the extent of State liability in each of those cases. In the case of action by the administrative officers and the naval and the military commanders, the liability is highest because they are engaged in carrying out the policy and the particular orders of the Government and they are under the immediate and disciplinary control of the executive and presumably therefore acts done by them are acts sanctioned by the State and until such acts are disavowed and until if they are of sufficient importance, their authors are punished, the State may fairly be supposed to have identified itself with them. In such cases, the Government is bound to disavow them and to inflict punishment giving reparation when necessary. Judicial functionaries are less closely connected. There are no well-regulated States in which the judiciary is not so independent of the executive that the latter has no means of checking the acts of the former. Again judicial acts might be municipally right though they may effect an international wrong. And even when they are flagrantly improper, no power of punishment may exist. All therefore that can be expected in the case of wrongs inflicted is that compensation shall be made and if the wrong is caused

by an imperfection in the law of such a kind as to prevent a foreigner from getting equal justice with a native of the country that a recurrence of the wrong shall be prevented. Wrongs by legislative bodies generally arise with reference to expropriating legislation and we will come back to it later. According to Oppenheim, however injurious to a foreign State the activity of Parliament may be, it can never constitute an international delinquency. This cannot be correct. States will have to bear vicarious responsibility. Though the position of a Government especially in the case of representative Government is difficult, that does not concern the wronged State which has a right to demand satisfaction and reparation for the wrong done. According to Hall, it follows from the indisputable duty of a State to provide itself with the best means of fulfilling its obligations that if the laws are such that it is incapable of preventing armed bodies of men from collecting within it and issuing from it to invade a neighbouring State it must alter them. Applying the same test to Courts, if its judiciary is so corrupt or prejudiced that serious and patent injustice is frequently done to foreigners it ought to reform the Courts and in isolated cases, it is responsible for the injustice done and must compensate the sufferers. It is however impossible to maintain that a Government should provide itself with the most efficient means that can be devised for performing its international duties. A despotic Government may be better able to do so than a constitutional Government. It cannot be pretended that a State is bound to alter the form of polity under which it chooses to live in order to give the highest possible protection to the interests of foreign States. To do so, would be to call upon it to sacrifice the greater to the less and to disregard one of its primary rights of independence —the right that is to say of a community to regulate its life in its own way. All that can be asked is—according to him—that the best provision for the fulfilment of international duties which is consistent with the character of the national institutions, it being of course understood that those institutions are such that a State with them can be described as well ordered to an average extent. A community has a right to choose between all forms of polity through which the ends of State existence can be attained but it cannot avoid international responsibility on that plea of a deliberate preference to anarchy.

Coming to judicial functionaries, the Institute of International Law at Lausanne in its draft declared that the State is responsible if the procedure of its tribunals or the judgment is manifestly unjust especially if they have been inspired by ill will towards foreigners as such or the citizens of a particular State. The draft prepared by an American Committee of Jurists in 1928 defines denial of justice for which the State is responsible as including the denial, delay or exceptional difficulty of access to the Courts, gross deficiencies in the judicial or remedial process, the absence of those guarantees which are indispensable to the proper administration of justice or a manifestly unjust judgment. But it adds that an error of a national Court which does not produce manifest injustice is not a denial of justice. According to Oppenheim in case of such denial or undue delay of justice by the Courts as is internationally injurious, a State must find means to exercise compulsion and the same is valid with regard to obvious and malicious act of misapplication of the law by the Courts which is injurious to another State. The Sub-committee of the League of Nations Committee of Experts for the Progressive Codification of International Law is of a different opinion. "A judicial decision," it declares, "whatever it may be, even if vitiated by error or injustice, does not involve the international responsibility of the State." It admits that the State is responsible for denial of justice but this it defines narrowly as the refusal to allow foreigners access to the Courts. According to this view, the decision of a Court may be intentionally erroneous, it may be a misinterpretation of the law or it may be manifestly unjust but the State is not responsible for injuries sustained by foreigners as a result of the decision. This view has the support of weak and backward nations but it is not the view on which Great Powers act and has apparently few supporters among jurists outside Latin America and the Orient. The irresponsibility of the State for the wrongful decisions has been supported in the award of the Senate of Hamburg as arbiter in the Croft case and in the case of Yuille Shortridge Company. We have referred already the cases on the other side. Westlake's opinion is that the State cannot excuse itself by laying the fault on the judges or on a jury, however independent of the executive its constitution makes them. The reason given is that International Law is not concerned with the

particular forms of organisation which the States adopt; it merely proclaims their responsibility leaving them free to discharge their international obligations through such organs or agencies as they may see fit to establish.

In 1923, when the murderer of the Russian Delegate to the International Conference was acquitted by a jury in Switzerland in the face of incontrovertible evidence, the Soviet Government refused to accept the verdict and held the Swiss Government responsible and the latter denying responsibility, the Soviet Government declared a boycott of the Swiss goods and later resorted to other measures of reprisals, such as the expulsion of Swiss nationals from Russian territory. In 1928, the Parisian Jury condemned the murderer of Italian Consul only to two years' imprisonment which the Italian Government considered very inadequate. Similar was the position taken by Italy on the murder of General Tellini in Greece. In these cases, the person murdered was an official representative in whose case a greater degree of diligence is insisted on and so they may stand on a special footing and may not be authority on the general question. On political murders generally and of political representatives in particular, the Council of the League of Nations adopted the following opinion given by a Committee of 10 lawyers, viz, "the responsibility a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal. The recognised public character of the foreigner and the circumstances in which he is present in the territory entail upon the State a corresponding duty of special vigilance on his behalf." The rather high standard of diligence insisted upon by the United States and adversely commented on by Hall has not found favour with the experts. Miscarriage of justice in political cases is very possible both in Paris and the United States of America where the jury are so often elected representatives. To avoid international squabbles, a succession of American Presidents have urged the transfer of jurisdiction in cases involving offences against aliens to Federal Courts. In order to avoid the charge of imperfect attention to the claims of foreigners, several American States have provided for compensation being paid to foreigners by the counties or towns concerned when

they become victims of mob outbreaks. There are similar provisions also in Belgium, France and certain of the German States.

Liability for the acts of private persons, mobs and insurgents.—The duty of a State in respect of private persons is only to exercise due diligence to prevent internationally injurious acts on the part of private persons and in case such acts have been committed to procure satisfaction and reparation for a wronged State as far as possible by punishing the offenders and compelling them to pay damages when required. Beyond this the State is not responsible. If it has not exercised due diligence, it would be responsible. This rule applies whether the acts are directly against foreign State representatives or against private individuals. The rule is not different though larger claims have sometimes been made with respect to the acts of rioters or insurgents. Individuals who enter foreign territory must take the risk of an outbreak of insurrections or riots no less than the risk of the outbreak of other calamities. Its Courts must be accessible to the foreign subjects for the purpose of claiming damages from the offenders and its Courts must punish such of those acts as are criminal. A higher claim was made in Santa Isabel case by the United States of America against Mexico but was repelled by the Commission. The Government was exonerated as it had not omitted to take reasonable measures to disperse and capture the bandits. Some jurists would make a distinction between mob violence generally and mob violence directed against foreigners as such.

Another kind of international delinquency which has received considerable attention in recent years is non-payment of money due from a State to other States and nationals of other States. Right of States to intervene in such matters is conceded if necessary even by war. But Drago, the Foreign Minister of the Argentine Republic, put forward the doctrine that States should not use force for the recovery of their national's debts. This note was evoked by the action taken by the British and German Governments against Venezuela which included bombardment of a port. Lord Palmerston took the view that that it was entirely a matter in the discretion of the State concerned whether to resort to diplomatic representation or to force.

The views of Drago were put forward for adoption at the Second Hague Conference at the instance of the American representative and was agreed to in a qualified form, viz., that force may not be resorted in respect of debts due to subjects till arbitration is offered and refused. Covenant of the League affirms this view of the matter. There is some distinction in this matter between a foreign loan and a loan negotiated in the local market. In the latter case, the national has no right to protection as he takes it with his eyes open and subject to all risks. It will be noticed that the Convention does not apply to debts due to a State. In order to avoid foreign State intervention, the Governments of a number of Central and South American Republics frequently insert in contracts with foreign nationals a clause known as the Calvo clause whereby the foreign national renounces the claim to international intervention. Though they may have the effect of ousting international jurisdiction till local remedies are exhausted, they have been held generally not to have the effect of ousting the right conferred upon the State to intervene in its own right and not in the right of the national. In this matter President Wilson was of opinion that "No Government ought to support its nationals in claims to the detriment of the country against which the claim is made." He always refused to support capitalists who had made investments abroad which were unreasonable or gave them an undue advantage. Before using force States would undoubtedly have regard to the taxable wealth of the State, purposes of the loan whether it was incurred to meet the personal wants of the ruler or for economic development, the economic policy of the country with which the debtor trades and finally not so as to make it impossible to the State to carry on its activities. In this as well as other matters State intervention would be much affected by the question as to whether the foreign national is one permanently residing in the State or is a mere traveller or temporary resident. In the former case, seeing that he must be deriving benefit by intimate association with the State, it might be less right to intervene on his behalf then in the latter case.

There is influential opinion in favour of the view that the international law has regard to vested rights and would not permit expropriation of the rights of foreigners without compensation. There is an extreme view on the other side

on which the Soviet has acted that the State is not bound by any such rule. An intermediate view that is supported by Sir John Fisher Williams is that all that a foreigner can insist upon in this matter is an equal treatment with the nationals and if the legislation affects equally the foreigner and the national, the foreigner or his State cannot complain.

In the Chorzow Factory case between Germany and Poland, a clause in the Geneva Convention providing for expropriation was regarded as a derogation from the "rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights" and therefore in the nature of an exception which should be strictly construed and could not be extended. But even so the Commission was of opinion that expropriation for reasons of public utility, judicial liquidation and similar measures were not affected by the Convention (Publications of the Permanent Court of International Justice Series A, Decision No. 7). The question whether when a State passes a general law of expropriation it is compelled to grant special treatment to foreigners was not decided in this case. That there is a general expectation that a foreigner will not be deprived of his property without compensation goes without saying but that it confers upon the foreigner a right under all circumstances is quite another proposition. As their Lordships of the Privy Council observed in *Jerusalem-Jaffa District Governor* v. *Suleiman Murra*[9] when the question arose whether an ordinance providing for expropriation without full compensation offended against the article of the mandate relating to the safeguarding of civil rights "this does not mean—as the Supreme Court recognised—that all the civil rights of every inhabitant of Palestine which existed at the date of the Mandate are to remain unaltered throughout its duration; for if that were to be a condition of the Mandatory's jurisdiction, no effective legislation could be possible. Nor does it in their Lordships' opinion mean that in every case of expropriation for public purposes full compensation shall be paid. Their Lordships agree that in such a case and in the absence of special circumstances, justice requires that fair provision shall be made for compensation. But this depends not upon any civil right but (as the

9. (1926) A. C. 321 at 328.

Chief Justice said) upon principles of sound legislation." Again as observed in *Attorney-General for the Dominion of Canada* v. *Attorney-General for the Provinces of Ontario, Quebec and Nova Scotia*10 there is a distinction between legislative jurisdiction and rights of property. There it was a question in respect of fisheries and the question was as to whether the legislature could regulate the hours of fishing and require the taking out of a licence of fishing and their Lordships held that the fact that the property rights in the fishery vested in the Provincial Government did not preclude the Dominion Government from legislating in respect of those matters or imposing taxes upon the property. By the issue of paper money, a Government may destroy almost the whole of the public debts which they owe in their currency whether to foreigners or to nationals. No foreign Government has taken up the cause of nationals in those circumstances. On the other hand in a recent case before the German Supreme Court (*see* 1928 Y. B. 12) the claim of the foreign bond-holders that the German devalorisation law was contrary to international law so far as it affected foreign bond-holders was rejected. The case is specially valuable as under the German constitution the rules of international law are accepted as a part of the law of the country. The American constitution which prohibits the taking of private property for public use without compensation has been held not to prevent the States from doing so for "police purposes," that is to say, in the regulation of the morals, health and safety of the community, as distinguished, it is said, from "confiscation of private property as national policy, whether communistic, anti-foreign or merely for mercenary purposes." The Supreme Court of the United States has upheld under this head legislation which in effect abolished without compensation the right to specially cheap transportation granted to a person as a compensation for injuries sustained (219 U. S. 467), suppression of a livery stable kept in a particular district without compensation (237 U. S. 171) and reducing the value of a real estate by a Zoning ordinance (47 Supr. Court Reporter 114). This police power may justify the suppression of absinth as in France, liquor as in America, or large landed estates as

10. (1898) A. C. 700.

in Austria-Hungary. Resort to Police power is not the only way in which property can be affected prejudicially. A State with collectivist leanings might deprive owners of a large part of their profits by imposing heavy income-tax or even of property by imposing heavy death duties or making a capital levy ? It would be an interference with the independence of Sovereign States to say that they should not pursue what economic policy or social doctrine that they should consider beneficial but should so order their house as not to affect the property rights of aliens who by entering into the country should *prima facie* be taken to assent to the laws of the country.

The principle of national treatment was recognised in the judgment in the case of *The Reparation Commission* v. *The United States of America* where the question was whether the property of the Standard Oil Company in Germany should be considered subject to the payment of the charges provided for by the laws carrying out the Dawes plan. The judgment is prefaced by the statement "Whereas in the application of a generally accepted principle any person taking up residence or investing capital in a foreign country must assume concomitant risks and must submit under reservation of any measures of discrimination against him as foreigner to all the laws of the country, whereas therefore an allied or associated national having invested capital in Germany has no ground for complaint if for this reason he incurs the same treatment as German nationals, whereas the principle of equality of treatment and not of discrimination in favour of allied and associated nationals has been consecrated by the Treaty of Versailles dealing with the treatment accorded in Germany to the interest and property of the said nationals". Applying this principle, it was held that the Standard Oil Company's property was equally subject to the imposts along with the German nationals. The Italian Government introduced legislation creating a monopoly of life insurance with no compensation to existing insurance companies doing business in Italy many of which were foreign. The foreign Governments concerned protested and several jurists supported them. The Bill however became law in 1912. The only concession made was to allow companies both national and foreign 10 years, a longer period than originally proposed to wind up their business. The South African Republic had recently under consideration

legislation as to diamonds which involved the acquisition of valuable rights without compensation. Uruguay proposed legislation similar to the Italian but on protest from the Governments concerned dropped. The British objections were based on the general grounds that the measure involved expropriation without compensation, that the British Insurance Companies had spent large sums in erecting and extending their business subject to the regulations imposed by Uruguay law, that it was only by continuing to carry on business that they could expect to recoup themselves and that under the proposed law valuable assets comprised in the term goodwill would be annihilated" but the general tone of the British remonstrance was more akin to that of diplomatic remonstrance against a measure, *e. g.*, an increase of customs duties which though clearly within domestic jurisdiction, nevertheless may have harmful effect on the interest of a foreign country. In the case of Toberman, Mackey and Company the United States claimed damages from Mexico on behalf of the claimant for losses sustained on account of the negligence or lack of care of the Mexican Custom authorities in consequence of which a quantity of hay, which had been placed on the wharf and inadequately protected from exposure, was spoiled. The claim was disallowed by the Commission on the ground that there is no clear principle of international law which obliges a Government to take special care as if it were a private storage concern of merchandise which comes through custom houses for the purpose of exercising the sovereign right of collecting import and export duties. In respect of this item of "goodwill", even those who are in support of vested rights theory without qualification as to national treatment are willing to make a distinction. Discussing the clause of the American constitution as to expropriation of private property without compensation, Mr. Justice Holmes says: "No doubt a business may be property in a broad sense of the word and property of great value... But a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the constitution undertakes absolutely to protect." The report of the Committee of Jurists engaged under the auspices of the League of Nations seems to adopt the view that national treatment is the utmost that an alien can demand for his property. On the question of treatment of foreigners, this is what the report says, "Here also, the

will of the community of peoples is clearly defined. It accepts the abovementioned rights" (to which I have already referred as being the minimum which a State should accord to foreigners in its territory) but it does not thereby recognise the right to claim for the foreigner more favourable treatment than is accorded to nationals. The maximum that may be claimed for a foreigner is civil equality with nationals. This does not mean that a State is obliged to accord such treatment, to foreigners unless that obligation has been embodied in a treaty. We thereby infer that a State goes beyond the dictates of its duty when it offers foreigners a treatment similar to that accorded to nationals. In any case, a State owes nothing more than that to foreigners and any pretension to the contrary would be inadmissible and unjust both morally and juridically". Even those that are for national treatment of aliens would recognise an exception in favour of pretended national treatment but in fact a discrimination against foreigners having regard to the facts of the particular case—*e.g.*, where the property expropriated is in fact all foreign property. The International Law Association at Vienna on August 9, 1926, resolved as follows on the question of protection of private property:—

1. It is generally recognised by the constitutions, civil codes or common law of civilised States that private property may not be expropriated without compensation.

2. In so far as the question of immunity of private property from confiscation arises in international relations the same principle is generally accepted.

3. A State is by the law of nations entitled to intervene to protect its nationals in another State (*a*) from injury to their property resulting from measures which discriminate between them and the nationals of such other State, and (*b*) from actual injustice even if there is no such discrimination.

4. It is contrary to the principles of international law . . . to deprive a foreigner of the fundamental rights to which he is entitled as owner through indirect ways which though not in law but in fact lead to an expropriation without compensation. Discrimination against foreigners is a ground of interference even in other cases where domestic jurisdiction is more widely recognised. We shall consider that aspect of the case more fully in the next lecture.

CORRESPONDENCE.

We gladly publish the following:—

NATIONAL ASSOCIATION OF THE LEGAL PROFESSION IN INDIA.

CIRCULAR.

1. A unified, homogeneous bar for the whole of India has been the dream of eminent Indian lawyers, for the realisation of which they have worked both in and outside the legislatures. The Bar Councils Act was a step towards bringing about unification. More than five years have elapsed since the Act was passed, but the process of unification has not kept pace with time. It is felt that some further measures are called for in order to accelerate unification.

2. At present, the local bars are engrossed with the Courts in their own districts and with purely local questions relating to the administration of law in their districts. Even in a single district there may be separate bars, one confined to the Civil Courts and another to the Criminal Courts, with very little inter-relation or cohesion. The result of this state of things is a narrowing down of the outlook, a failure on the part of members of the bar to appreciate the wider duties and responsibilities of the profession and inability to adopt adequate measures to efficiently discharge the collective responsibilities of the profession.

3. In the domain of law and administration of justice there is much need for collective action. The settlement of civil disputes in a satisfactory manner is a necessary part of the economic life of the community. Where the costs of litigation are excessive, it becomes an expensive luxury beyond the means of a majority of the people and the utility of the courts of justice is to that extent diminished. The legal profession, acting in co-operation with the judiciary, can do much to bring about reforms in the procedure so as to reduce costs and delays in litigation.

4. There are, besides, other ways of rendering service by the members of the profession to the public. Apart from helping in the administration of justice by the practice of law in the Courts, they can serve the people through the legislatures and public bodies and generally by securing for the people and working a liberal and representative constitution. Theirs is also the duty, when occasion arises, of assisting in a liberal interpretation of the constitution, by the Courts.

5. There was a time when the legal profession was the preserve of certain classes of persons. To-day, it is a thoroughly demo-

cratic profession in the sense that it allows free entry to man or woman, irrespective of class. The profession comprises members drawn from every section of the public, and therein lies a dual advantage. The members are acquainted with and are competent to bring to bear upon the problems calling for solution the needs and sentiments of their constituency, *i.e.*, the class from which they come, and secondly, they are best able to convey, in the most suitable and acceptable form, the conclusions to which they arrive, to their respective constituencies. At present this is rendered impossible owing to the lack of any organised action on the part of the profession.

6. Apart from acting as hindrance to the ultimate unification of the Bar, this state of isolation deprives the local bars of the advantages to be derived from the exchange of information, current thoughts, ideas and experience of the profession. Each bar is left to tackle its problems without the benefit of any guidance from another bar that may have successfully dealt with the same or similar conditions. The result is an unnecessary waste of energy, duplicated efforts, and hardship to the public.

7. Organisation is not an end in itself, but a means to an end; that end is the development of professional consciousness and the regaining of lost leadership by the profession. Leadership has been lost because of the failure of the profession to discharge its collective responsibility to the public. Leadership in the administration of justice is a great employment, but that alone should not satisfy a profession which is fitted to chart the course of government, and social and economic progress. The legal profession is best fitted to debate the leading questions of the day and crystallize sentiment to the point of action, and then direct its course. A consideration of and contribution towards the solution of the problems at present facing the country would be in keeping with the heritage of the legal profession in India.

8. If co-ordination of the bar is not permanently to remain a pious hope, if the profession is to regain its lost leadership, some action seems to be urgently called for. The time has come for the formation of a NATIONAL ASSOCIATION OF THE LEGAL PROFESSION IN INDIA. If such an Association is formed, it would be possible for a body of delegates, representing the profession in all parts of the country, to meet periodically for a comparison of views and for friendly intercourse. The Executive Committee of the Association would adopt measures for establishing closer relations between the bar associations in the districts, and an organic connection between the several associations. It may be conceded that the foundation period will be long, the growth slow and the organisation at first, largely social. Nevertheless a beginning must be made. The Association can give a strong impetus in the direction of the nationalisation of the Bars. With better times coming, the

growth of the Association is bound to be rapid, but the foundation has to be laid without further delay. The Association will give a powerful impetus and aid towards organising local bar associations wherever they do not exist and strengthening those that are already in existence. It will, in fact, have a powerful, cohesive, co-ordinating and vitalising effect upon the bars throughout India.

9. To weld together all the separate bars into one body of common understanding and common sympathy and common purpose inspired by the spirit of public service is essential to India if justice is to be secured, and law and its administration are to keep pace with the rapid changes of life in our country.

10. Having regard to the importance of the subject, it is proposed to have a Committee consisting of representatives of each of the principal bar associations in India, to consider the matter in all its aspects, and, if thought fit, to take steps to bring the Association into existence, thereby beginning a new and useful chapter in the history of the legal profession in India.

11. The undersigned begs, therefore, to invite through your Journal, every Bar Association in your Province, to nominate one or more representatives to serve on the proposed Committee and to communicate their names and addresses, at its earliest convenience, to the undersigned. The Committee will carry on its work either by correspondence or by holding a meeting or meetings or in such other manner as may be deemed convenient.

NAYAN H. PANDIA, M.A., LL.B.,
Attorney-at-Law,
Joint Editor, The Bombay Law Journal.

SUMMARY OF ENGLISH CASES.

ATTORNEY-GENERAL *v.* JACKSON, (1932) A C. 365.

Executor—Right of retainer—Insolvent estate—Debt due to executor—Crown debt for arrears of tax—If executors can retain against the Crown—Administration of Estates Act, 1925—*Bankruptcy Act,* 1914.

By his will, a testator, who died in June, 1929, bequeathed the whole of his estate to *J* whom he appointed his sole executrix. The estate was insolvent. The assets were worth only £1,000. The Crown had a claim for arrears of income-tax and super-tax of over £4,000. There were other creditors for £4,000 including a claim by the executrix for £1,000 lent to the testator. The executrix claimed to retain the whole of the assets to satisfy her debt. The Crown disputed her right to retain against their debt, at any rate to the extent of "one year's assessment" under S. 33 of the Bankruptcy Act, 1914, read with S. 34 of the Administration of

Estates Act, 1925. As one year's tax itself came to more than £1,000 the question did not arise if the Crown could claim priority for the whole arrears.

Held, that the law allows the executor to retain so much as will pay himself before any other creditors whose debts are of equal degree. The statute, as here, has in some cases exalted simple contract debts to a higher degree of priority. To the extent to which the Crown's claim for taxes is given priority in bankruptcy it is a debt of a higher degree than that of the executrix in this case and she cannot exercise her right of retainer in priority to such claim.

In re *Ambler*, (1905) 1 Ch. 697, not approved.

STEADFORD *v.* BELOE, (1932) A.C. 388.

Income-tax—Pension to Headmaster—Discretionary payment—If chargeable to income-tax —Income-tax Act, Sch. E and Finance Act, 1922, *S.* 18.

The governing body of Bradfield College, who are a corporation founded by Royal Charter, had the power under the charter to apply the funds under their control to give allowances and pensions to persons who have been headmasters in their school. On the retirement of the respondent they granted him a pension. It was a matter entirely of their discretion and voluntary and could be withheld at any time.

Held, that the payment is voluntary and not chargeable to income-tax. It is not a profit from the headmaster's employment or given to him in respect of his office, as it is not given to him until he resigned his office and no longer held the office. It is not therefore taxable under Sch. D as a profit because a mere voluntary gift is not a profit within the meaning of Sch. D, since it is not, in the true sense of the word, income but merely a casual payment which depends upon somebody else's good will.

Duncan's Executors v. *Farmer*, 5 Tax Cas, 417, distinguished.

HEARTS OF OAK ASSURANCE CO., LTD. *v.* ATTORNEY-GENERAL, (1932) A.C. 392.

Industrial Act, S. 17, sub-sec. (1)*—Industrial Assurance Company—Inspector or Commissioner investigating a company's affairs —If can hold enquiry in public.*

Held, by the House of Lords, Lord Dunedin dissenting, that an Inspector appointed by the Industrial Assurance Commissioner under S. 17 of the Act to examine into and report on the affairs of a company amenable to the Act "is not entitled to conduct the

inspection in public but this shall not prevent him from admitting from time to time any persons the presence of whom is reasonably necessary to enable him properly to carry his duty under the statute." Such an inspector "is not entitled to make public the information gained by him in the course of such examination or of the exercise of the powers conferred upon him by the said sub-section and by S. 76, sub-sec. (5) of the Friendly Societies Act, 1876, or otherwise to make use of such information save for the purposes of carrying out his examination and of preparing his report on the affairs of the plaintiffs and for purposes ancillary thereto."

The same rule applies even when the Commissioner enquires into the affairs himself. The nearest analogy is that of an Inspector appointed by the Board of Trade under S. 135 of the Companies Act, 1929, to investigate the affairs of a company and to report thereon.

In re *Grosvenor and West-End Railway Terminus Hotel Company,* (1897) 76 L.T. 337, applied.

HOARE & Co. *v.* COLLYER, (1932) A.C. 407.

Income-tax—Brewery Company—Owner of 600 houses—Some houses let at reduced rents, rents being foregone for purposes of trade—Others at excess rent—If excess rent can be set off as against the claim for deduction for low rent houses—Income-tax Act, 1918, *Sch. D.*

A brewery company owned about 600 leasehold or freehold licensed houses let to tenants who were under an obligation to take their supply of beer exclusively from the brewery company. In the case of some of these houses they were let at rents less than the annual value under Sch. A of the Act in the case of freeholds and less than the head rent in the case of leaseholds. These reduced rents are accepted for the purpose of increasing the volume of beer sold. In some cases the rents received by the company exceeded the annual value or the rent as the case may be. By virtue of *Usher's case,* (1915) A.C 433, the company are entitled in preparing their accounts for assessment under Sch. D as profits from the trade to deduct as an expense the difference between the rent received and the Sch. A assessment on the basis of property. The Crown contended that, in a case where one owns a number of houses like this, the houses must all be treated as one entity, and that surplus rent received in some cases by the company over and above Sch. A assessment should go in reduction of the amount of allowances to which the company is entitled where the rent is below such assessment.

Held, that excess of rents over valuations cannot in respect of any house be taxed under Sch. D, whereas by *Usher's case*, (1915) A C. 433, the company is entitled to a deduction under Sch. D where it has foregone the rent. The contention of the Crown will be to bring into charge under Sch D the thing which admittedly is not chargeable at all, namely, in the case of every house where the rent exceeds Sch A valuation, the amount of the excess. Therefore although the rents foreborne and the expenses incurred in the case of certain houses form a proper item of debit in the account under Sch. D, the rents received in the case of other houses in excess are excluded from that account.

Fry v. *Salisbury House Estate, Ltd.*, (1930) A.C. 432 followed.

THE KING *v.* B. C. FIR AND CEDAR LUMBER CO., LTD., (1932) A C. 441.

Income-tax—Canada—British Columbia Taxation Act, 1924, c. 254—Fire insurance amount—If liable to tax as income from business.

A company was carrying on business in British Columbia in Lumber. In 1923, their plant and premises were destroyed by fire. These subjects were insured against loss by fire under annual policies. The company was also insured by the insurance companies against further loss or damage they might sustain in the event of their plant either in whole or in part and for a period being shut down or its working suspended in consequence of fire. The former was termed insurance in respect of "fixed charges" and the latter in respect of "loss of net profits." The amount received under "fixed charges" was treated as a receipt on capital account and not disputed. The question arose whether the receipt from the insurance company in respect of "loss of net profits," was liable to be brought into account for income-tax assessment,

Held, that this insurance receipt was produced by a premium paid out of revenue for the express purpose of ensuring in an event a sum in substitution for and the equivalent of net business profits over a defined period of time. It is therefore necessarily a revenue receipt of the business which must have been brought into account for determining the "net income" of the business for income-tax purposes.

Commissioners of Inland Revenue v. *Newcastle Breweries*, (1927) 12 Tax Cas. 927 and *J. Glikste*n *& Son, Ltd.* v. *Green*, (1928) 2 K.B. 193: (1929) A.C. 381 followed.

BARTON *v.* REED, (1932) 1 Ch. 362.

Landlord and Tenant—Lease of premises—Restrictive covenants against user for business but only for residence—Underlease

on the same terms—Underlessee carrying on business—Breach of covenant—Lessee knowing of breach but not stopping it—Covenant in lease not to do or suffer to be done any business—If lessors entitled to re-enter.

The Governors of a College granted in 1865 a lease of a private residence on their premises to *D* for a term of 84 years. The lease contained, beyond the usual conditions, a restrictive covenant that the lessee or his assigns, etc., shall not *use or suffer* the same to be used for the carrying on thereon any trade, business or manufactory. The lease contained a proviso for re-entry on breach. In 1894 the lease was assigned to *R* subject to an underlease by *D* to *G* for 79 years. The underlease also contained the restrictive covenant. *G* assigned the underlease to *P* who converted the building, till then used as a single dwelling house, into three flats and let them out on rent. *P* also agreed to supply the occupants with hot water, heat, lighting, cleaning, etc. The Governors issued notice to *R* complaining of the breach but she took no steps to prevent *P* from continuing the breaches. In an action for re-entry,

Held, that what *P* did constituted carrying on of business and a breach of the covenants of her underlease. Subletting of premises in suites of apartments with or without the provision of any other service is a business. As there is no contractual relationship between a lessor and an underlessee, the lessor can re-enter only if it also amounts to a breach by *R*, the assignee of the lease. The covenant binding on *R* is that she will not "suffer" the premises to be used for the carrying on thereon of any business. "Suffer" is a wider term than "permit" and it covers allowing something to be done which the covenantor has the complete power to prevent, and it also imposes on the covenantee a liability to take legal proceedings to prevent the thing being done." As *R* did not take steps to prevent *P* from doing business after she came to know of it, there was also a breach of the covenant by her, entitling the lessors to re-enter.

Atkin v. *Rose*, (1923) 1 Ch. 522 followed.

In re SIR THOMAS SPENCER WELLS. SWINBURNE-HANHAM *v.* HOWARD, (1932) 1 Ch. 380.

Crown—Bona Vacantia—*Mortgagee—If trustee of equity of redemption—S. 296, Companies Act, 1929—If retrospective.*

A company mortgaged its interest in three leasehold properties to *W* and assigned to him, the whole of the unexpired residue of the terms for which they were held subject to the usual proviso for redemption. It covenanted also to repay the mortgage amount with interest at 4 per cent. per annum. In 1910, the company went into voluntary liquidation and a liquidator was appointed. In 1916,

the company was dissolved but as then there was a large sum due to the mortgagees and the liquidator thought the equity of redemption was of no value, he took no steps to either surrender it to the mortgagees or sell or dispose of it to any other person. After dissolution, the rents on the property increased and the mortgage amount was largely paid off therefrom. The equity of redemption became of value and the Crown claimed to be entitled to it as *bona vacantia* and *W* claimed to be entitled to it free from any equity of redemption.

Held, that the transaction between the company and *W* took the form of an absolute assignment of the whole terms, subject to the equity of redemption. The only cases where the Crown can claim as *bona vacantia* property or money in the hands of another person is where the Crown can show that the property or money is held upon a trust which has failed. If the property had been sold by the mortgagees prior to the dissolution of the company, and the position was that on the dissolution of the company, the mortgagees had in their hands moneys representing the proceeds of the sale, which were in excess of the amounts required to repay them their debt, then the mortgagees would be holding the amount in their hands as trustees for the mortgagor and the Crown would have a good title to those moneys. But the mortgagees are not trustees of the equity of redemption to the mortgagor. It is an equitable interest in the land which could have been asserted by the company and as the company has ceased to exist, the right can no longer survive to the Crown. The dissolution of the company enures for the benefit of the mortgagees and they hold an estate on dissolution freed from any right in any one to redeem.

Russian and English Bank *v.* Baring Bros. & Co., Ltd., (1932) 1 Ch. 435.

Banker—Bank incorporated in Russia—Branch in England—Action brought by British share-holders in the name of London Branch—Head office dissolved by Soviet legislation—Action if can be continued—Position of the Branch—Companies Act, 1929, *S.* 338, *sub-sec.* (2).

A banking corporation incorporated in 1911 in Russia with its head office in Russia, established a branch in London in 1915. In 1917, Bolshevist revolution broke out and at some subsequent date the Bank was dissolved or otherwise ceased to exist according to the Russian law. Nearly three-fourths of the shares were held by British share-holders and an action was commenced by them in England in the name of the London Branch to recover moneys alleged to belong to the plaintiffs in the hands of the defendants.

Held, that on the dissolution by the Soviet Decree, which is like laying of the axe at the root of the tree, the foreign corpora-

tion with its branches ceased to exist. A defunct corporation is in the eye of the law no party at all and when once the Court is made aware that the plaintiff is non-existent and therefore quite incapable of maintaining the action, it is bound to put an end to it. The acts of those who have intermeddled with the affairs and assets of the branch, after the destruction of the parent company, can be regularised by adoption and ratification by a liquidator in a winding-up under S. 338, sub-sec. (2) of the Companies Act as an unregistered company. As there are no continuing members of a dissolved company, the petition will have to be presented by a creditor of the company.

Opinion of Lord Finlay in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse,* (1925) A C. 112 not followed.

Goukassow's case, (1923) 2 K.B. 682 followed.

In re MORTON: MORTON *v.* MORTON, (1932) 1 Ch. 505.

Family settlement—Agreement between four out of five members of family—Fifth not heard of for 12 years by them—Subsequent appearance of the fifth member—Refusal by him to ratify or concur in the settlement—Result of.

By a will, dated 1914, a testator W. M. devised all his estate to his wife absolutely. He died in 1928, after having survived his wife and without having made any further will. Therefore he died intestate. According to the law of intestate succession, his five brothers were entitled to succeed. The whereabouts of one of the brothers *T. M.* was unknown, he not having been heard of for over 12 years at the date of the death of *W. M.* As *W. M.* had expressed a desire to give a share to his niece *M. H.*, who was living with him from her infancy, the other four brothers executed a family settlement giving her a share in the property. *T. M.* subsequently appeared and claimed his one-fifth refusing to concur in the arrangement.

Held, that a family arrangement come to by the persons who have signed the deed without the knowledge or in the absence of one member of the family intended to be affected thereby, is to be regarded, in the absence of any proviso to the contrary, express or implied, as having been entered into on the assumption that the absentee will in due time join in the transaction. His concurrence is therefore an implied condition of the validity of the arrangement, and if it is not obtained, the arrangement is not binding on any of the parties to it.

Peto v. *Peto,* (1849) 16 Sim. 590 and *Bolitho* v. *Hillyar,* (1865) 34 Beav. 180 followed.

The fact that *T.M.* is not named as a party in the deed does not distinguish this from the above cases as he is referred to there-

in so as to make it plain that the deed was made upon the supposition that if living he would ultimately concur in the arrangement.

In re DAVIES' WILL TRUSTS. BEVAN *v.* WILLIAMS, (1932) 1 Ch. 530.

Construction of statutes—Complicated legislation—Two possible constructions, one taking away a vested right and another retaining it—Rule of construction.

"It is right in the case of complicated legislation," such as the Law of Property Act, 1925, "to place a benevolent construction on the various sections, and in a case of doubt to avoid the result that rights possessed before the coming into force of the Act are seriously affected or even destroyed as a consequence of a difference in the legal machinery which the legislature has thought fit to create in an endeavour to simplify the law."

In re P. E. AND B. E. KERN, (1932) 1 Ch. 555.

Bankruptcy—Execution—Part payment of judgment-debt to withdraw Sheriff—Subsequent payments in instalments—Adjudication as bankrupt of judgment-debtor—Instalments within three months—First payment beyond three months—Liability to repay—Bankruptcy Act, 1914, *Ss.* 37 *and* 40.

In execution of a decree for £214, it was agreed that the debtors should immediately pay £100 to the creditor on account of the judgment debt and the balance by monthly instalments of £20 each. In pursuance thereof £100 was paid on August 30, 1930 and two instalments of £20 on September 26, and October 27. As default was committed in further payments, the creditors entered into possession of the properties on December 13. On December 16, a receiving order was made on the debtor's own petition and the debtor was adjudicated a bankrupt. The trustee in bankruptcy claimed from the creditors the sums received by them in execution, as money paid by the bankrupt under an execution which was not completed before the date of the adjudication.

Held, that undoubtedly the two sums of £20 were repayable as having been received within the date of 3 months to which the trustee's title relates back under S. 37. Even as regards the sum of £100, it is repayable as having been received in execution which was not complete on the date of the receiving order within the meaning of S. 40 and it is not necessary for that purpose that the receipt should also be within the period mentioned in S. 37. If the execution creditors choose to keep alive the execution for a long time for their own purpose, they cannot complain of hardship. "S. 40 is a substantive enactment and the right of the trustee thereunder is not limited to the benefits of execution received by the

execution creditors after the date to which the trustee's title to the bankrupt's property relates back."

LAZARD BROS. & Co v. BANQUE INDUSTRIELLE DE MOSCOW, (1932) 1 K.B 617: 101 L.J.K.B. 65.

Practice—Judgment against non-existent person—Validity of —Russian Bank—Decree against—Garnishee proceedings founded on such decree—Bank ceasing to exist by date of decree—Garnishee order, if can be issued.

L, an English Firm, having a claim in debt against a Moscow Bank, sued the Bank in the English Court and, with leave of the Court under O. 9, R. 2, sent notice through registered post to the defendant Bank. Judgment was later signed against the Bank in default of appearance. *L* Co. then obtained a garnishee order nisi against another Bank *M* in respect of moneys said to be owing by *M* Bank to the Russian Bank. The *M* Bank contested the order on the ground that the Russian Bank had ceased to exist and that the service of notice on the Russian Bank was irregular.

Held, that on the evidence and reading the Russian decrees, the Banks in Russia had been nationalised and had ceased to exist as separate entities, at any rate from the time when the steps directed for the nationalisation of the banks had been finally completed. Further the order for service under O. 9, R. 2 was invalid and a nullity and no garnishee proceedings could be founded upon it.

Per *Scrutton, L.J.*—The rule that if a person injuriously affected by a judgment by default and not a party to that action desires to set aside the judgment, he must apply either in the defendant's name, if he is entitled to use it, or in his own name, by a summons served both on the plaintiff and the defendant, to have it set aside, does not apply to the case of a non-existent person, or defendant on whom no summons can be served. "If it comes to the knowledge of the Court that it has entered judgment in default of appearance against a man who was at the time dead, or a company which was at the time dissolved, or non-existent according to the law of its country of origin, the Court is bound, after hearing the parties interested, of its own motion to set the judgment aside. Such a judgment is null and void."

Per *Slesser, L.J.*—It is necessary "in order to found garnishee proceedings, that there shall be a judgment upon which proceedings may be based, and it is very clear, when the matter is fairly considered, that there was not in existence here any judgment on which the Court could properly Act. A defendant has a right to have a default judgment set aside if it is signed irregularly." As a general principle, when the Court comes to

the conclusion that it has been induced to act upon affidavits which are not candid and do not fairly state the facts, but are stated in such a way as to mislead the Court, there is power in the Court to protect itself and prevent an abuse of the process."

WESTMINSTER BANK, LTD. v. OSLER; NATIONAL BANK, LTD., v. BAKER, (1932) 1 K.B. 668.

Income-tax—Bank—Conversion of War-bonds to conversion Loan and War Loan—Profits by such conversion—If taxable.

The Banks had acquired National War Bonds of various issues. In the events which happened none of the said bonds was repaid by the Government, but they were converted into 3½ per cent. conversion Loan Stock or into 5 per cent. War Loan 1929-47. The question was whether in arriving at the profits of the Bank for the purposes of the income-tax assessments, there should be included any sum as representing profit resulting from such conversion.

Held, that by conversion the Banks put an end to the existence of the National Bonds as such in their hands, and preferred, instead of waiting till the due date, to exchange the Bonds at the time when they did for these new issues. It is simply a case of a sale on certain terms fixed by the Government, and investment of the proceeds. Therefore, whether in the books of the Bank they did so or not, this is to be regarded as a definite change of an investment upon certain terms which reveal an enhanced price, and the margin so revealed by that enhancement of the price is the profit and is therefore liable to income-tax.

Royal Insurance Co. v. Stephen, 14 Tax Cas. 22 approved and the dicta in *California case*, 5 Tax Cas. 159 and *Brown v. National Provident Institution*, (1921) 2 A C. 222 relied on.

W. T. LAMB & SONS v. GORING BRICK CO., LTD., (1932) 1 K.B. 710: 101 L.J.K B. 42.

Damages—Breach of contract—Appointment as "Sole selling Agents"—Sale by manufacturers (Principal) direct—If breach of the contract.

By an agreement in writing, the defendants, who were manufacturers of bricks and other building materials, appointed the plaintiffs, "sole selling agents of all bricks and other materials manufactured at their works" for three years and afterwards "continuous subject to twelve months' notice by either party." About two years later, the defendants wrote to the plaintiff that they intended in the future themselves to sell all materials without the intervention of an agent and actually sold some directly. In an action for damages for breach of contract,

Held, by the Court of Appeal and Wright, J., that the words "sole selling agents . . . ." mean that the plaintiffs were to have the right of selling in their capacity as agents all the bricks, etc., manufactured by the defendants themselves and that during the currency of the agreement neither the defendants nor any other agent appointed by them, can sell the materials.

Snell Grove v. *Elbringham Colliery Co.*, 45 J.P. 408 followed and *Bentall* v. *Vicary*, (1931) 1 K.B. 253 distinguished by Wright, J. and Scrutton, L.J. *Per* Greer and Slesser, L.JJ.: "Neither of the cases affords us any assistance one way or the other in the present case" as both of them deal with the relation of principal and agent and neither of them has to do with purchasers and their vendors.

VAUXHALL ESTATES, LTD. *v.* LIVERPOOL CORPORATION, (1932) 1 K.B. 733.

Statutes—Construction—Provision in earlier Act that provisions in other Acts inconsistent with it "shall cease to have or shall not have effect . . ."—Provision in a later Act inconsistent—Effect of.

The Acquisition of Land (Assessment of Compensation) Act, 1919, provided for the assessment of compensation of lands compulsorily acquired under it on a particular basis and by S. 7, provided that "The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect . . ." S. 46 of the Housing Act, 1925, provided a different mode of calculation of compensation which was inconsistent with the mode provided in the 1919 Act.

Held, that even assuming S. 7 of the Act of 1919 applies even to provisions in future Acts, it is open to Parliament at any subsequent time to repeal or amend the enactment of 1919 either expressly or impliedly and where there are two inconsistent provisions found in two Acts of Parliament, the one passed subsequently to the other, the later provision shall prevail and shall be deemed impliedly to repeal the earlier provision in accordance with the maxim "*Leges posteriores priores contrarias abrogant.*"

Per *Avory, J.*—"S. 7 of the Act of 1919 in its true construction is restricted to existing Acts of Parliament."

BACK (INSPECTOR OF TAXES) *v.* WHITLOCK, (1932) 1 K.B. 747.

Income-tax—Resident of Straits Settlements—Change of residence to England—Income arising from foreign possessions—

No change in the nature of income—Method of calculation of income-tax—Income-tax Act, 1918, *Sch. D, case V, r.* 1 *and Finance Act,* 1926, *S.* 29.

The respondent, having resided in the Straits Settlements for many years, took up his permanent residence in England in April, 1927. While in Straits Settlements he was in receipt of income from stocks, shares and rents arising in the Settlements and that income continued after his arrival in England. The income in the year previous to settling in England was larger than that during the year of assessment and the question arose if the case fell under S. 29, sub-S. (1) (*b*) (*ii*) of the Finance Act, 1926 as of income first arising in April, 1927, when he came to reside in England.

Held, following *Fry* v. *Burma Corporation,* 1930 A.C. 321, that the income of the respondent cannot be regarded as having arisen only when he swam into the purview of the Income-tax Acts. The income did not first arise in the year preceding the year of assessment.

MANN *v.* NASH, (1932) 1 K B. 752.

Income-tax—Profits of illegal trade—Liability to tax—Income-tax Act, S 237, Sch. D.

The assessee who was trading as an amusement caterer, was also dealing in, or the use of, certain automatic machines which were made for "unlawful gaming." These machines he placed with the proprietors of public premises so that persons resorting to the premises might indulge in gaming by the use of them. The profits which thus accrued were divided between the assessee and the occupier of the premises. It was contended for the assessee that an illegal trade is not a trade within the meaning of the Income-tax Act and its profits are not liable to be taxed.

Held, that the letting out of these machines in a commercial way with a view to the reception of profits in a commercial way is a "trade" so that the profits are chargeable to tax and the consideration that it is tainted with illegality does not affect the liability to tax. The State finds profit made from what appears to be a trade and taxes it. It does not thereby follow that the State is either condoning or taking part in it or sharing in the illegality.

Hayes v. *Duggan,* (1929) I.R 406, dissented from.

F. E. SELDON *v.* CROOM-JOHNSON.

SAME *v.* BRUCE THOMAS, (1932) 1 K B. 759.

Income-tax—Barrister becoming a King's Counsel—Whether sets up a new profession thereby.

The question was if a practising barrister sets up a new profession when he commences to practise as King's Counsel.

Held, when a Barrister is made a King's Counsel, what happens is that the Sovereign confers a titular rank which is recognised in the Courts by giving the holder precedence, a seat within the bar, and by entitling him to wear a silk gown. He abstains from doing certain classes of work which he did before appointment. But he is still acting in the same way as before, practising the art of advocacy. Both the junior Barrister and the King's Counsel carry on the same profession; only, the King's Counsel occupies a higher rank of degree within it. The King's Counsel does not therefore "set up . . . within the year of assessment" a new profession within the meaning of R. 1, sub-R. (2) of the rules applicable to cases I and II in Sch. D to the Income-tax Act, 1918.

JOTTINGS AND CUTTINGS.

Retirement of Mr. Justice Rowlatt.—After twenty years' judicial service Mr. Justice Rowlatt has retired, and thereby the King's Bench Division loses one of its ablest and most expeditious judges. A very learned lawyer, he employed the leisure hours of his early days at the Bar by writing the classic treatise on the law of principal and surety, but very soon thereafter he became one of the busiest of juniors and ere long was appointed to the responsible post of common law Treasury "devil," which made him busier still. That post he held for seven years concurrently for a part of the same period, with the Recordership of Windsor, so that he came to the High Court Bench well equipped for the more important duties which there confronted him. Like the other common law judges he had to take his share in the varied work that falls to them, both in town and on circuit, but from the frequency of his being in charge of the revenue paper the profession came to associate his name almost exclusively with the difficult and not very exhilarating branch of litigation there dealt with. The decision of intricate points of income-tax law appeals little to the man in the street, or indeed, to any one save litigants striving to escape the meshes of the inspectors of taxes, and the little group of specialists who have "Dowell" at their finger ends, with the consequence that Mr. Justice Rowlatt was much less often in the public eye than many of his judicial brethren. This in no way perturbed the learned judge who has never courted the public gaze and has been content to dispose of his lists quietly and unostentatiously. So identified has he been with the revenue paper that it was eminently fitting that at the conclusion of the term's list the Attorney-General should have offered some happily phrased valedictory remarks, dwelling on the pleasure it had been to all members of the bar to argue cases in his Court where, as he said, the gathering had always partaken

more of the character of a family party than of a meeting of opponents. Mr. Justice Rowlatt was obviously gratified with this expression of regard, and we may assure him that he will carry with him in his retirement the good wishes of the whole profession for many years of quiet enjoyment.—*S.J.*, 1932, p. 221.

The Rights of a Time-expired Convict.—The action *Bottomley* v. *F. W. Woolworth & Co., Ltd.* (*The Times,* 2nd and 3rd March) was brought by Mr. Bottomley in respect of certain matter defamatory to himself contained in an American Magazine sold in England The defendants pleaded that they were ignorant of the libellous matter, and Horridge, J., held that, in effect, there was no evidence that their ignorance was due to negligence, a matter on which the finding of the jury, who awarded Mr. Bottomley £250, was adverse to them. A point of law, however, on which Mr Bottomley and the judge did not see eye to eye arose on the position of a person who has "done time". Mr. Bottomley is reported elsewhere to have "quoted a case" to the effect that one who has served his sentence is in the same position as he who has received the King's pardon, a proposition to which the judge did not give assent. The case was not mentioned in the other report, but it may be surmised with some confidence that it was *Leyman* v. *Latimer,* (1877) 3 Ex. D, 15 and 352. The head-note on page 15 in fact rather supports Mr. Bottomley's contention than otherwise. The defendants had called the plaintiff a "felon editor," and pleaded that the plaintiff had been convicted of and sentenced for a felony. The plaintiff replied that having served his sentence he beame as cleared from the crime and its consequences as if he had received the Queen's pardon under the Great Seal. On demurrer this was held a good reply. The judgment of Cleasby, B., however, hardly appears to go further than to rule that a person convicted of felony and sentenced does, on the expiration of his sentence, cease to be a felon like one who holds the King's pardon, and therefore must not be so called. A true statement that a person has formerly been convicted of a particular offence cannot, of course, give rise to damages in a civil action. Criminal proceedings might lie if such a statement, though true, was made wantonly, in circumstances which did not justify assertion so provocative. Anyone released after duly serving either a sentence of penal servitude or imprisonment is no doubt in the usual case in the most deplorable situation, and suggestions that he is minded to commit the same or any other class of offence, unless amply justified by evidence, merit severe damages against those who utter them. There is a distinction, however, between "this is a soiled dove" and "this was once soiled dove." The past can be lived down but not expunged, for, in Mr. Kipling's language, "though you mount and continue the race, the hoofslides are scarred o'er the course."—*S.J*, 1932, p. 221.

Slaughter of Animals.—The Slaughter of Animals Bill now before Parliament, if passed into law, will put an end once and for all to the anomalous state of affairs which has been existing for some years past in regard to the humane slaughter of animals. That there is every prospect of the Bill becoming law demands of little doubt. It is a non-party measure backed by representative members belonging to each of the four political parties. Some years ago the Ministry of Health published model bye-laws with regard to the use of humane appliances for the slaughter of animals, and these bye-laws have been adopted by a certain number of local authorities with results which have proved very satisfactory. The Bill now before Parliament incorporates appropriate portions of these model bye-laws and applies them to the whole country. The object of the Bill is to ensure that all animals except swine slaughtered in slaughter-houses and knackers yards' in England, whether for human food or otherwise, shall be humanely killed. It is provided that all slaughter men shall be licensed so that only competent persons can be employed, and it provides for the inspection of slaughter-houses not only by the police but by inspectors of local authorities and also by officers of societies for the protection of animals who are authorised by the Minister of Health to have access to such places. The penalties for breach of the Act are severe and include a fine of £20 for a second offence, after which the same fine may be repeated, plus imprisonment not exceeding sixty days. There is also a provision which will be welcomed (in view of the shocking disclosures that have appeared from time to time in the newspapers) by which the wholesale slaughter of animals affected by foot and mouth disease is to be carried out by officers of or persons employed by the Minister of Agriculture using mechanically-operated instruments approved by the Minister. Proper provision is, of course, made for the slaughter of animals by Jews and Mohammedans in accordance with their religious beliefs—*S J*, 1932, p. 222.

Judges and Knighthood.—In the life of Lord Eldon in Campbell's "Lives of the Chancellors", we are told that, when that great lawyer was appointed Solicitor-General, "to the high contentment of the Bar, and the general satisfaction of the public," he modestly wished to avoid knighthood, but George III then laid down a rule, which has been adhered to ever since, that the Attorney-and Solicitor-General, and the judges, if not "honourable" by birth, shall be knighted, "to keep up the reputation of the ancient Order of Knights-bachelors." As most people are aware, nearly all of the judges, immediately after their appointment, receive the dignity of knighthood in accordance with this old rule. Some of our older readers may remember that Mr. Justice R. S. Wright struggled hard to escape being made a Knight—a

dignity which, said he, put him on a level with City Aldermen and others with whom he had no desire to be likened In the end, the practice or custom was too much for him, and so, with a very bad grace, he accepted the honour which he considered no honour at all, in this resembling the man mentioned by Frederick Locker Lampson, in his entertaining book "Patchwork," who, having met a friend who had just been given a handle to his name, said "A knighthood, I presume?" "No," said the other, "a baronetcy." "I am sorry for that," replied the first. "Sorry, why?" asked the recipient of the dignity. "Well," answered his candid friend, "you see, if it had been a knighthood the infamy would at least have died with you," a somewhat cruel observation even for a candid friend. The order instituted by George III above referred to excepts from the obligations of being knighted those who are "honourable" by birth. Several sons of peers on being promoted to the Bench have on this account declined to be knighted, among these being Mr. Justice Denman and the present Lord Russell of Killowen. Others have been content not to vary from their colleagues in this matter and have accepted knighthood as has just been done by Mr. Justice Lawrence, who, as the son of a peer, could have claimed to be excused.—*S J*, 1932, p. 293.

Mental Defect.—A most valuable recommendation is that before a sentence of preventive detention is passed the prison authorities should be required by statute to submit to the court a statement containing a report from the prison medical officer on the mental and physical condition of the offender, such information as can be collected as to his history and circumstances, and observations as to his suitability for such a sentence The question of psychological treatment the committee approach with considerable caution. They do not agree with the view that crime is a disease or generally the result of mental disorder: they do, however, believe there is a certain amount of persistent crime due to abnormal mental factors and that "there is reason to suppose that certain delinquents may be amenable to psychological treatment." They permit themselves, therefore, to recommend that a medical psychologist should be attached to one or more penal establishments, that selected cases should be placed voluntarily under treatment, a systematic follow-up conducted over a prolonged period, and the results—failures as well as successes—of such accredited medical psychologists published in due course. A reasonable concession if not all that was hoped for in some quarters.—*L.T.*, 1932, p. 428.

Lawers on the Saturday Review.—The *Saturday Review*, which has just changed hands, started on its career in 1855 with a staff which was chiefly composed of members of the Bar, several of whom were to rise to high positions in the Profession. Among

these were Sir Henry Maine, Charle Bowen Fitzjames Stephen, Sir William Harcourt, Thomas Collett Sandars, and George Stovin Venables, the last-named being usually accounted the prototype of George Warrington in Thackeray's "Pendennis," It was a brilliant galaxy of writers whom John Douglas Cook, the editor, gathered round him when he left the *Morning Chronicle* and started the famous weekly. From the first, as someone has said, the new journal was lacking neither in ability nor in audacity, in both respects of each of the contributors playing his part. Speakig of Fitzjames Stephen, his biographer—his brother, the late Sir Leslie Stephen—says that as became a good Saturday reviewer, he fell foul of many popular idols. One of these was James Payn, whose fiction achieved a certain popularity, which of itself was an excellent reason why Stephen should trounce it to his heart's content. Years later the novelist and the reviewer became intimate friends, and the latter on one occasion re-called with no little amusement how he had pitched into one of Payn's novels. Payn did not perceive the humour of the situation quite as keenly as did Stephen, and he says that he noted with no little satisfaction that after his reviewer reached the Bench the newspapers usually referred to him as "the hanging Judge." However, not all Stephen's contributions were conceived in a savage strain, and a goodly number of the less severe were afterwards collected under the title "Horæ Sabbaticæ." Bowen, who had a lighter touch than his future judicial colleague, told one of his correspondents with much humour that all the articles with hard historical names were his, getting them, as he went on to say, from Bayle's Dictionary, while the quotations from Seneca he was obliged to compose himself, not having a Seneca in the house.—*L.T.*, 1932, p. 438.

Lord Brentford and Sir Donald Maclean.—Within the last fortnight the political world has become the poorer, by the death of two solicitors, Lord Brentford, known till recently as Sir William Joynson-Hicks—a name which invited and received contraction into "Jix", without any loss of the esteem in which he was held, but rather as a mark of popularity—and Sir Donald Maclean. Of different political parties, but of the same evangelical religious faith, they were almost of the same age and each practised in London, though Sir Donald Maclean also practised in Cardiff. Lord Brentford was a member of the firm of Joynson-Hicks & Co., and Sir Donald of Church, Rackham & Co., and each rose to a high position in his party by solid gifts of integrity and character, rather than brilliance. Sir Joynson-Hicks was Home Secretary in the Conservative Government from 1924 to 29, thus weathering the storm of the General Strike, and in the latter year he went to the House of Lords as Viscount Brentford. But before this elevation he had been a foremost opponent in Parliament of the

proposed changes in the Prayer Book Sir Donald Maclean was handicapped in his political career by the declining fortunes of the Liberal Party, but when in the confusion of parties at the end of the War Mr. Lloyd George had ceased to be its leader, Sir Donald Maclean took his own independent line and led a remnant, furlorn, perhaps, but sincere. Upon the formation of the present Government he was one of the Liberals included and became President of the Board of Education, and upon its departure from the traditional policy of Free Trade he was in the minority who "agreed to differ." It is not long since it was rare for solicitors to attain high political rank, but a change began when Sir Henry Fowler left Wolverhampton to hold the various offices which culminated in his being Secretary of State for India and going to the House of Lords as Viscount Wolverhampton. But since then a solicitor has held the premiership during, perhaps, the most critical years of the history of this country, and the loss of Viscount Brentford and Sir Donald Maclean still leaves a number of well-known solicitors in responsible public life.—*L.J.*, 1932, p. 421.

Courts and Parliament.—There was one question in the New *South Wales Case*, of which we wrote (p. 393 *ante*), on which we should have liked to have had a decision from the Judicial Committee. Can the Courts of a State interfere to restrain Ministers or Officials of Parliament from doing acts which are in the ordinary course of legislative procedure? When this case was in the New South Wales Courts (31 N.S.W. 183 and 204-5) it was keenly argued for the Ministers who sought to resist an injunction that no command could issue to prevent them from having free access to the King's representation, or from passing, or helping to pass, any law—whether *ultra vires* or not. The judiciary, they said, has no control of the Legislature and cannot enjoin it not to pass an unconstitutional Act—though it may condemn that Act as *ultra vires* when it comes before them in the Courts The Chief Justice (Street, C.J.) felt some difficulty in meeting the argument, but decided that those who asked for an injunction were not asking the Court to interfere in the affairs of Parliament, but to protect them against a breach of the law from which (as members of the threatened Upper house) they would suffer special loss. The objectors did not fight on this ground either in the High Court of Australia, or, so far as the report shows, in Whitehall; but we must confess to a certain affection for it. One cannot argue from English Precedents for the New South Wales Parliament is not a Sovereign Parliament. Here with us, of course, it is a fundamental rule that Parliament (King, Lords, and Commons) is master of its own procedure.—*L.J*, 1932, p. 422.

Persistent Offenders.—The grave peril to society constituted by the persistent offender has long exercised thoughtful minds. Of

39,000 persons imprisoned in 1930 more than 50 per cent had already been once in prison and more than 12 per cent. ten times and more, and not the least difficult aspect of the problem was felt to combine the general principle of gradation of sentences according to the gravity of the offence with that of relating them to the offender as an individual and not to the particular charge before the Court. The preventive detention of the 1908 Prevention of Crime Act meant an empty life with no reformative value, and as practised had no application to any but the old lag, whereas the twenty-one to thirty class constituted in 1930, 25 per cent of the total convicted of indictable offences—*L.T.*, 1932, p. 427.

The Report.—The report just published confers a public service: it deals with this vital matter in a bold and practical manner, free of sentimentality, and keeps in view from beginning to end the paramount necessity for checking criminal propensities and fitting the offender for return to normal life. The solution put forward is detention of a duration to permit of reform and imposed by Courts of assize and quarter sessions in lieu of and not in addition to imprisonment or penal servitude. This new detention would be of two different types. "Prolonged detention" (five to ten years), imposed largely in the public interest, would be for the "professional" criminal, but would be more directly remedial in aim than at present: in the case of "detention" (two to four years) there would be an attempt to subject the prisoner to discipline and control on the general lines of Borstal training as adapted to more adult offenders. Conditions would be at once less repressive and definitely more strenuous than in ordinary imprisonment, the personal relation would be introduced by putting one responsible man in charge of a small group, and education would be made an integral part of training and related as closely as possible to the industrial occupation pursued, while an attempt would be made to utilise prisoners' labour on work of national importance.—*L.T.*, 1932, p. 428.

New South Wales and Manitoba.—Who could seriously think, for instance, of a Chancery Judge's granting an injunction to veto the picturesque formalities of Royal Assent of which we read in the otherwise prosaic pages of Erskine May? Another interesting point is to compare this great decision with that in *Initiative and Referendum Act*, In re, (1919 A.C. 935: 88 L.J.PC. 142). Where New South Wales succeeded, Manitoba failed: and the attempt of the great western territory to fit itself out with a *referendum* was nipped in the bud. The reason was that the measure which proposed to establish it did not pay sufficient respect to the position and powers of the Lieutenant-Governor of the Province. His "office" was withheld from the area of legislative power which was assigned to the Provinces of British North

America by the Imperial Act of 1867. This, at least, was the reason given in Lord Haldane's judgment, though we must say, with respect, that as to the most important provision of the Manitoba Act it is difficult to support it. For the rest, Lord Haldane made one observation which, if it applied in New South Wales, would have gone for to help the unsuccessful litigants of last week. Speaking of certain powers to delegate legislative capacity which the Provinces had exercised, he went on to say:—

> "but it does not follow that it can create and endow with its own capacity a legislative power not created by the Act to which it owes its existence."

This is just what the successful litigants in New South Wales did; and now they have had their right to do it vindicated —*L.J.*, 1932, p. 422.

Whips and the Lords.—Goodness and mercy are indeed manifest in some parts of modern legislation; as in the Children and Young Persons Bill, which the Lords last week, were considering in Committee. So far as consistent with economy or reduced expenditure, there will be children's courts, kept apart by dates, places, or associations from the courts where older or more hardened offenders are tried. Praiseworthy and laudable motives are behind the proposed enactment. Moreover, the words "conviction" and "sentence" old lags both, with criminal associations, are eliminated from the Bill and from the language of the new juvenile tribunals. Such words have an evil savour and leave an evil mark upon the mind.

But despite some display of benevolent opposition on the part of the Government, the Lords by 65 votes to 22 decided that after what used to be called conviction, but may now be called a finding of Naughty, the Courts might leave their marks upon the offending child. Whipping was not, indeed, resolved upon until references had been made to their Lordships' boyhood days and public school punishments and results. The Juvenile Court whipping is indeed to be done decently and in order: a constable will act as executioner in the presence of a sergeant, the parents to have the right of free admission to the show. But when such nasty words as "sentence" and "conviction" are taken away, ought not the constable to be taken out of uniform and disguised as a cleargyman? The "officer of higher rank" as a Bishop, an Archdeacon or a Rector at the least!—*L.J.*, 1932, p. 430.

Preventives.—One might, indeed, go further back and give the children and their punishment to the ecclesiastical courts. A constable in uniform whipping a naughty child seems all out of harmony with the general benevolence of the Bill.

It is not, perhaps, fair to play the carping critic and to offer no more than one constructive suggestion. The Bill has yet a long

way to go before it becomes an act of Pariament, and one may suggest an alternative remedy.

Accepting as beyond all reasonable doubt the fact that the ancient public school punishment (apart from that advocated by King Solomon) has helped to make so many members of the House of Lords what they are, why not, before having recourse by Act of Parliament to constabulary whipping of children, try the effect of impositions? Take those hardened little criminals to whom Viscount Bertie and Lord Atkin referred. Compel them to write out the speech of Lord Danesfort, with its allusions to public school and Holy Writ, twenty times at one sitting. It would be difficult to refute the objector who called this torture; but it would probably be very preventive. Whipping is not so; for, as Viscount Exmouth pointed out, amid roars of laughter, reformatory boys whom he had supervised preferred whipping to prayers—*L.J.*, 1932, p. 430.

Hard for the Judicial Committee.—There has been much discussion in the Temple as to whether the Judicial Committee of the Privy Council, in refusing to advise His Majesty to grant the Dublin Policemen leave to appeal against a judgment of the Supreme Court of the Irish Free State, have or have not justified the criticism of some Dominion Lawyers that its decisions are not wholly uninfluenced by motives of policy. It is, of course, notorious that Dominion critics who would abolish the right of appeal, to the Privy Council do assert that the Judicial Committee does not invariably decide questions wholly and solely on the legal merits of the case. The House of Lords is outside the ambit of this criticism.

Things must be extraordinarily difficult, sometimes, for the Judicial Committee. It is known that their advice to his Majesty, in a particular case, may have grave political consequences; and although its decision may be perfectly sound and good in law, there will always be those who doubt. This Irish case, where it was known that most of the big Free State parties were strongly opposed to the right of appeal; where the Attorney-General for the Free State was not represented or his absence explained, but all was left to Mr. Dickie, K.C., for the appellants—this was a case in point.—*L.J.*, 1932, p 451.

Unofficial Jokes.—It is well that the Bench did not take too seriously the indiscreet practical joke which recently brought a young barrister into that part of the police-court not usually occupied by the bar. Even judges have been known to be led astray by a misguided sense of humour Mr. Justice Field for instance, while travelling with Mr. Baron Pollock, was guilty of one of the most surprising acts of mature irresponsibility. Having surreptitiously got possession of his brother judge's railway ticket, he

confided to the guard of the train that "the old gentleman in the corner" was trying to defraud the company. His delight knew no bounds when his learned colleague was required to produce his ticket and found himself unable to do so. But Pollock, B., was not amused.—*S.J.*, 1932, p. 457.

Other uses for Books.—When Mr Justice Swift recently confiscated a Testament which was being employed to demonstrate a traffic problem, he took the course once adopted by the eminently religious Phillimore, J., when a witness emphasised his evidence by banging the book on the ledge of the witness-box. "Nearly everyone," said Swift, J., "who comes into the box uses the Testament to represent something, sometimes a tramcar and sometimes an omnibus." All books brought into a court of law are liable to be pressed into some such service. While he was at the Bar, the late Mr. Justice Alpers, of New Zealand, once had a running down case in which his opponent overwhelmed the Court with citations. Alpers had no cases, but he commandeered all his adversarys books to build a plan of the scene of the accident. He won on his demonstration.—*S.J.*, 1932, p. 457.

Presumed Dead: Judgment Accordingly.—Until last week one had not believed that the presumption of death was irrebutable. That a Court of Law, in certain circumstances, will admit a presumption of death, thereby rendering lawful and right dispositions of property, which would not have been lawful without proof of death or the judicial presumption of the same, is known to all. But cannot the Court reconsider the case on the disturbingly fresh fact of the man appearing alive and well? If the heir of vast estates appears the day after he is presumed by a Court of Law to be dead, he should have no great difficulty in obtaining so much of the estate as had not already been disposed of. Probably the judgment of Judge Tebbs at Walsall County Court went no further than that; though a newspaper report gives the words as "I have pronounced a judgment presuming that this man is dead, and I have in jurisdiction to alter it." At any rate, it was probable that the small inheritance divided after the judgment and paid to thirteen different relatives had been lawfully spent.

But it was very hard on F. Burford, who had been absent for so many years and unresponsive to advertisements, to find that Judge Tebbs could view him only as a corpse incapable of lawful resurrection in the matter before the Court.—*L.J.*, 1932, p. 15.

Ignoring the Presumption.—Filled with indignation and desiring to put the matter to a further test in another tribunal, the dead man proceeded from the County Court to the house of one of the thirteen relatives who had received his brother's inheritance and, according to report, broke a window. For this he was arrested

and pleaded in vain with the policeman that he was a dead man and could do no wrong. Before the Magistrates he made the like plea in vain, citing the decision of the County Court Judge, and declaring that the decision was enough to stir up any dead man, let alone a corpse as lively as he had proved himself to be.

Here indeed was a legal poser, and the magistrates looked to their Clerk for legal illumination. Fully admitting the difficulty that "the learned Judge having ruled that you are legally dead, I wonder whether you can legally commit a crime," the Clerk seemed to be in a quandry until the prisoner assured him that he felt very much alive. This simple testimony the magistrates accepted, without any adjournment for consultation of legal authorities. The dead man was fined three pounds and given three weeks in which to search for the money.—*L.J.*, 1932, p. 15

Queries.—That difficulties may arise from judgments based on legal presumptions and from other errors is manifest. Burford's is a case in point. In judgments, as in other mortal matters, there is nothing final and absolute. The Judge who boasted to the Bishop: "If I say to a man 'you be hanged', he is hanged; if you say 'you be damned,' he may not be so"—was overstating his powers. The condemned man might die naturally or from poison or a pin in the meantime, or might be reprieved.

Somethings, however, are fairly certain in our law, and one is that a man cannot be punished twice for the same offence. Suppose a young man is found guilty of murder, sentenced to death, and the sentence commuted to one of penal servitude for life. "Life" is not necessarily the prisoner's lifetime; and the definite period may be reduced for good conduct or other causes. If the prisoner, on release, discovers that the man he was found to have murdered is still alive, and rectifies the error by killing him on the spot can he be charged, convicted and punished again for the murder of the same man? The answer would appear to be in the negative. And the situation, though very unlikely, is not impossible There does not seem to be any fully reported case on the point.—*L.J.*, 1932, p. 15

Evidence of Previous Accident.—On Saturday of last week a Divisional Court dismissed the appeal by the defendant in *James v Audigier* from an order made by a County Court Judge refusing to grant a new trial. The facts were shortly these: The defendant's motor-bicycle had mounted the pavement at Willesden and injured the plaintiff, who claimed damages. In the course of the cross-examination the plaintiff's counsel asked the denfendant whether, just before the accident than in question, he had had another accident at the same place the results of which had proved fatal, and whether he had told the coroner's jury who had exonerated him anything about the present accident. The defendant

admitted that the fatal accident had occurred, and that at the inquest he had kept silent about the occurrence. The jury awarded the plaintiff £150, and the defendant's counsel, who had not formally objected to the questions, asked for a new trial on the ground of misreception of evidence. Mr. Justice Swift, in the course of a considered judgment, said that it was not competent to ask a defendant in an action for negligence whether he had been negligent on some previous occasion, and still less was it competent to ask him whether he had been involved in some other accident for which it was not suggested he had been to blame. But questions could quite properly be put to him to test his credibility, or to show that he was an inexperienced and unskilful driver, if those matters were in issue, and if in the case before the court proper objection had been taken to the questions, the county court judge would, his Lordship considered, quite rightly have ruled that they were fairly put. The appeal would, therefore, be dismissed.—*L.T.*, 1932, p 22.

Abuse of Cross-Examination—The County Court, like the High-Court, has an inherent general power to prevent the right of cross-examination being abused, and in the course of the above judgment Mr. Justice Swift quoted Order XXXVI, r. 28, of the Rules of the Supreme Court, which provides specifically that "the judge may in all cases disallow any questions put in cross-examination . which may appear to him to be vexatious or not relevant to any matter proper to be inquired into in the cause." His Lordship noted that a similar provision was contained in Order XXII, r. 12, of the County Court Rules. The rules which confine evidence to the points in issue not only preclude proof of uncontroverted facts but limit the mode of proving the issues themselves by excluding evidence of all such collateral facts as afford no reasonable inference with respect to the matters in dispute. "Such evidence," it has been said, "tends needlessly to consume the public time, to draw away the minds of the jurors from the points in issue, and to excite prejudice and mislead." Moreover, the other party who has had no notice of such evidence, may be unprepared to refute it Generally speaking, it is negligence in a person unskilled or inexperienced to undertake the doing of an act which, in the absence of skill and experience, would be likely to injure others. In the latest edition of "Pollock on Torts," it is said in this connection that "if a man will drive a car, he is bound to have the ordinary competency of a motorist," and that the rule, of which this is an instance, applies "in every case that can be put". In the present case the coroner's jury seems to have found that there was no negligence of the kind in question, though, of course, an inquest and verdict are in many cases inadmissible even though they touch the question of responsibility. Further, the plaintiff's counsel seems to have disclaimed any intention of

imputing blame for the earlier accident. The case for the admission of the evidence may have been stronger on the ground of credibility, and we await a full report with interest.—*L T.*, 1932, p. 22.

BOOK REVIEWS.

THE STUDENT'S COMPANION TO THE INDIAN LIMITATION ACT, 1908, by V. R. Shah, B.SC., LL.B. Published by Ramakrishna Bros., Law Publishers, Poona City. Price Rs. 2.

The Indian Limitation Act is well known to be a comprehensive and complicated Act with a long history behind it. The decisions of Courts on various points arising thereon are by no means uniform and several outstanding questions are still left in a state of conflicting judicial views Books of the kind under review written as easy guides to students cannot adequately do justice to the subject. It may be a question if it is worth while attempting to do so. No doubt University students may find it useful to refresh their memory at the time of approaching examinations. Even as a text-book for students the treatment must be fuller. The present book is however statedly a student's *companion.* It has a modest aim. The author has naturally been very brief in his notes and commentaries. They are succinct and clear so far as they go The law students will find the book useful as an easy and clear introduction to a difficult and complicated subject.

A HANDBOOK OF THE LAW RELATING TO PRESS IN INDIA, by G. K. Roy. Published by Eastern Law House, Calcutta, 3rd Ed. Price Rs. 3 net.

This small but very instructive volume containing in a brief manner all information of the press in India will be found useful by the members of the legal profession as well as persons in the field of journalism who are editors of books or newspapers and keepers of printing presses. The report of the Committee to examine certain Acts relating to Press in India has been succinctly traced in order to enable the reader to have a fuller understanding of the Press Law. The Indian Press (Emergency Powers) Act (XXIII of 1931) and the Foreign Relations Act (XII of 1932) are treated here with the necessary notes along with the report of the Select Committee and Minute of Dissent Also passages from judgments of important cases like those of Mr. Mahomed Ali and Mrs Besant form an interesting portion of the book.

DIGEST OF THE ALLAHABAD LAW JOURNAL (1904-1931), by Katju and Bankey Behari, 2nd Ed. Vol. I. Price Rs. 12.

This attractive publication has everything to be said in its favour. For its usefulness, which the legal profession is sure to

enjoy, nothing need be added by way of praise, as every digest supplies us with a ready source of reference to case-law. But with cross references and in cases, where several points are dealt with, having them noted under several appropriate headings, this digest is bound to be appreciated more. The present has improved considerably upon the previous two editions. A compilation of this kind, digesting cases of the Allahabad Law Journal alone, may not appear quite an original thought to those who have known of a similar publication by the Madras Law Journal nearly two decades back.

INDIAN JUDGES, by Messrs. G. A. Natesan & Co., Madras. Price Rs. 3

Many, who need encouragement to escape succumbing to early trials and disappointments, will derive comfort and spirit from a perusal of this volume, containing anecdotes of the youthful labours and manly struggles of some of the glorious sons of the land But we feel the sketches would be arresting if they were marked by literary flair. One cannot but re-call with feelings of emotion and pride such illustrious names (to mention only a few of those included in this book) as those of Sir T. Muthuswami Aiyar, Dr. Subramania Aiyar, Sir V. Bhashyam Aiyangar and Mr. V. Krishnaswami Aiyar of Madras, Mr. Mahadev Govinda Ranade and Mr. Kashinath Trimbak Telang of Bombay, The Rt. Hon. Ameer Ali and Sir Gurudas Banerjee of Calcutta, Sir Promoda Charan Banerjee of Allahabad, and Mr. Shah Din and Sir Shadi Lal of Lahore. But to chronicle their lives' history and the numerous incidents which sum up their brilliance either as members of the Bar or as ornaments of the Bench is indeed a worthy task. We are not a little thankful to the publishers Messrs. G. A. Natesan & Co for providing us, though not sumptuously, with the details of fine careers that can ever chasten our activities and shape our ambitions. Still the book lacks completeness. For it is impossible for one to get reconciled to the very conspicuous omission of such a great judge and powerful personality as the late Sir Ashutosh Mukerjee in the galaxy of eminent Judges.

THE LAW OF TORTS, by S. Ramaswami Aiyar, Advocate, High Court, Madras. Published by Messrs. Butterworth & Co., Ltd. 1932. Price Rs. 10.

There have been many text-books on various branches of Indian law written by eminent Indian authors and the lawyers turn to them almost every day for guidance when they have to get at the underlying principles and give correct advice on the topics. It is sufficient only to refer to some of the more well known among them, such as Sir Rash Behari Ghose's Law of Mortgages, Mitra's Law of Limitation and Pre-

scription, Sir Gurudas Banerjee's Law of Marriage and Stridhanam, Sarvadhikari's Law of Inheritance, and in more recent years, the works on the several branches of law by the Right Honourable Sir Dinshah Mulla Though on the Law of Torts, we are aware that there are some text-books by Indian lawyers, it is no disparagement to them to say that Mr. Ramaswami Aiyar has reached a higher level of excellence than the others in that his book will meet not merely the needs of a lawyer but will also satisfy the jurist. There have been instances where the ignorance of the historical basis of some kinds of action led to occasional mistakes even by great Judges which have been corrected in later years. Any one who studies Mr. Ramaswami Aiyar's work will not commit any such mistakes based on false analogies, as the author has most clearly pointed out the growth of every action which we are familiar with to-day in the Law of Torts from the earliest times. In the treatment of the various topics, the learned author has displayed great learning and research and has given references to the works of the great masters of law and not merely to the decisions. In some cases, he has criticised the judgments of even eminent Judges and made good his observations on their judgments Further, it is no small credit to the author when we find that by his discussion of the principles on pp. 414 to 418 of his work, he seems to anticipate the pronouncement of the House of Lords in *M'Alister* v. *Stevenson* (1932 W.N. 139: 101 L J 119) which has not yet been fully reported in the Law Reports. The order of treatment of the various topics by the author in his work is more logical than in many other works on the subject, as he deals with the special torts in the beginning and only goes to the general exemptions from liability and vicarious liability towards the end of the book. An analytical and logical treatment of a subject is likely to leave out some of the cases which cannot be clearly brought in under any well-known head; and it is a matter for great satisfaction that the learned author has succeeded in bringing all the decisions under review in their proper places. We can sum up the merits of the work under review by saying that it is not merely one for the lawyer but for the jurist.

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SEPARATE REGISTRATION AND ASSESSMENT OF PORTIONS OF PERMANENTLY SETTLED ESTATES.

The Permanent Settlement Regulation XXV of 1802 provided that the proprietors of land shall be at liberty to transfer by sale, gift or otherwise their proprietary right in the whole or in any part of their zemindaries. The previous consent of the Government or of any other authority was not necessary. Such transfers were to be held valid by Courts of judicature and the officers of the Government, provided they were not repugnant to the Muhammadan or the Hindu laws or to the regulations of the British Government. But unless the transfers so made were regularly registered at the office of the Collector and the public assessment determined and fixed on such separated portions, they shall have no legal force or effect and the entire estate would be liable for the total land tax in the same manner as if no such transaction had occurred. (S. 8.) It was next provided (S. 9) that the Zemindar should send true and correct accounts of the entire estate as well as of the portions to be separated for a period of not less than three years previous to the sale or transfer to enable the Government to fix thereon a due proportion of the public revenue. The section specifically mentions three cases of alienation: (*i*) Sales for the arrears of public assessment, (*ii*) Sales for the satisfaction of decrees of Courts of judicature, and (*iii*) Transfers by sale, gift or otherwise.

The Regulation further enjoined in S. 10 that no separate estate should be created where the proportionate jama or assessment was less than 500 pagodas, but the section was repealed subsequently by Act II of 1869.

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In consequence of the above provisions, Regulation XXVI of 1802 was passed to govern the registration of landed estates paying revenue to the Government. S. 2 declares that Collectors should keep public registers for the purpose of registering the landed property within their respective Zillas, and enter all transfers of land in the said registers. Transfers of land without such registration were not to be held valid in Courts of Adalat and persons in whose name the entire estates were registered would be still liable for the payment of revenue on such lands.

The Collectors' Regulation II of 1803 (Ss. 17 and 18) made the Collectors responsible for the just and equitable apportionment of the assessment on the sub-divisions of the estates. The Collectors should furnish the proprietors the amount of the assessment so apportioned and transmit statements of public assessment so apportioned with remarks to the Board of Revenue. The assessment so made shall bear the same proportion to the value of such sub-divisions as the total jama to the value of the entire estate (Ref. S. 9 of the Permanent Settlement Regulation XXV of 1802).

Section 45 of the Revenue Recovery Act (II of 1864) provided that where parts of landed estates held under a Sanad-i-milkiyat-i-istimrar or otherwise subject to the payment of a lump assessment have to be sold for arrears of revenue, the Collector should have power to demand from the landholder or the karnam of the villages accounts for a period of not less than three years preceding the current year and where such a demand has not been complied with, the entire estate shall be sold. The method of apportionment laid down in the section was the same as in S. 9 of the Permanent Settlement Regulation. The provision in S. 46 of the Act that such apportionment was subject to the sanction of the Board of Revenue and that it had no validity until confirmation was repealed by Act VIII of 1914 (The Madras Decentralisation Act).

The above provisions were considered inadequate and Act I of 1876 was passed to make better provision for the separate assessment of land revenue of portions of permanently settled estates alienated by sale or otherwise. The enactment in respect of its subject-matter aims at being exhaustive and complete in itself (*vide* remarks of Bhashyam Iyengar and Benson, JJ., in

Secretary of State v. *Fischer*[1]). But as has been pointed out in *Maharajah of Vizianagaram* v. *Collector of Vizagapatam*[2] the provisions of Act I of 1876 must be treated as being supplementary to those of Regulation XXV of 1802 and read together.

It must be noted at the beginning that neither the Land Revenue Assessment Act nor the provisions of the various Acts and Regulations that led to it affect the validity of transfers *inter se* but only save the rights of the Government to realise the total land revenue from the entire estate in cases of non-registration.[2] Any apportionment of rent between the parties or any agreement as regards the assessment which the alienated portion should bear is binding upon the parties though not upon the Government. (Vide *Zamindar of Ramnad* v. *Ramamani Ammal*[3] and *Sri Rajah Inuganti Rajah Gopalarao* v. *Venkata Suryarao*[4].) The language of S. 8 of the Regulation as was held by the Privy Council in *Vencataswara Yettiappah Naicker* v. *Alagoomoottoo*[5] would seem to apply only to questions between the Zemindar and the Government and to have been framed with a view to prevent a severance of the zemindari without public notice to the Government. Again a right to registry follows title and an alienee is entitled to separate registration, notwithstanding any agreement between the alienor and alienee as to which of them is to be responsible for the revenue. Vide *Kamalammal* v. *Raju Naicker*[6].

The Madras Land Revenue Assessment Act (I of 1876) mentions the provisions under which separate assessment and registration of portions of permanently settled estates has to be made. Two conditions are necessary before separate registration can be ordered under that Act:

(1) The property sought to be separately registered and assessed should be a portion of a permanently settled estate.

(2) And having been alienated by sale or otherwise either by the person seeking separate registration or by his predecessor in title, the property should belong to a different owner. Unless these conditions are satisfied, one cannot succeed in having separate registration under the Act.

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1. (1902) I. L. R. 26 M. 389 at 392.
2. (1914) I. L. R. 38 M. 1128: 27 M. L. J. 278.
3. (1880) I. L. R. 2 M. 234.
4. (1922) 44 M. L. J. 64.
5. (1861) 8 M. I. A. 327 (P. C.).
6. (1896) I. L. R. 19 M. 308: 6 M. L. J. 179.

The property should have been 'alienated by sale or otherwise' as mentioned in the preamble to the Act. The Permanent Settlement Regulation (Ss. 8 and 9) and the Land Registration Regulation (XXVI of 1802, S. 3) use the word 'transfer' and not 'alienate'. The word 'alienate' has been held to be of wider import than 'transfer'. It includes not only cases of transfers *inter vivos* but also cases where the suit property has been separated from the main estate in such a way that the ownership of the land in question becomes vested in another person as owner. The case of a sale or gift calls for no special explanation. In *Pusarla Peda Brahmaji* v. *Trustee of Vizianagaram Estate*[7] the expression 'sale or otherwise' was interpreted to include cases of prescription. The title acquired by adverse possession is equivalent to that obtained by a grant as was held in *Sambasiva* v. *Ragava*[8] and the Privy Council in a case that arose in Bengal *Srimathi Krishna Pramoda Dasi* v. *Dhirendra Nath Ghosh*[9] observed that the person who acquired title by adverse possession could apply to have the separate registration of the same so as to avoid the risk of the land being sold for arrears of revenue due from the entire estate.

The word 'otherwise' in the preamble should not be interpreted *ejusdem generis* with 'sale'. It would be interesting to note that the words 'transfer, succession or otherwise' in S. 8 of the Madras Estates Land Act were held to include cases of surrender or abandonment on the same principle (refer *Jammalamadaka Subbarayudu* v. *Idupuganti Ramaswami*[10]) and the *Ejusdem generis* interpretation of the word 'otherwise' was negatived.

The decision in *Pusarla Peda Brahmaji* v. *Trustee of Vizianagaram Estate*[7] was followed with approval in *Vobilineni Subba Rao* v. *Rajah of Pithapur*[11] and *Avasarala Venkatarama Row* v. *Maharajah of Pittapuram*[12]. In the last mentioned case the scope of the enquiry under S. 2 of the Act was referred to and as a person becomes the owner of property as much by a transfer *inter vivos* as by the effect of adverse possession for the statutory period, the words 'or otherwise' were held to

7. (1919) 11 L. W. 389: 55 I. C. 703.
8. (1890) I. L. R. 13 M. 512 at 515.
9. (1928) L. R. 56 I. A. 74: I. L. R. 56 C 813 (P. C.).
10. (1926) I. L. R. 49 M. 620 : 50 M. L. J. 535 (F. B.).
11. (1926) 53 M. L. J. 400.
12. (1930) I. L. R. 53 M. 784 : 59 M. L. J. 312.

include cases of adverse possession also. The preamble was interpreted so as to be in consonance with S. 2 of the Act.

Again, a question arises as to the applicability of the Land Revenue Assessment Act to involuntary alienations of portions of Permanently Settled Estates. The words 'alienated by sale or otherwise' point to an affirmative conclusion. The word 'owner' in S. 2 of the Act points out that the Act is intended to deal also with cases other than 'transfers *inter vivos*'. It has also been pointed out in *Secretary of State for India* v. *Fischer*[1] that the enactment aims at being exhaustive and complete in itself and as such there is no reason why the Legislature should have taken involuntary alienations out of its operation. But in *Bommarasu* v. *Seshamma*[13] it was held that an alienation by court sale is not within the scope of Act I of 1876 but of S. 9 of Regulation XXV of 1802 and Regulation XXVI of 1802 and that a suit lies against the order of the Collector refusing or allowing separate registration as was held in *Ponnuswami* v. *Collector of Madura*[14]. The decision is open to doubt and when acquisition by prescription is treated as an alienation of the holding within the meaning of the preamble, it stands to reason that involuntary alienations such as court sales should be included as well under the Act.

The point that next arises for decision as a consequence of the use of the word 'owner' is whether a permanent lease comes within the scope of the Permanent Settlement Regulation and the Land Revenue Assessment Act. An early case in *Subbarayalu* v. *Rama Reddi*[15] held that a permanent lease is also a transfer within the meaning of the Permanent Settlement Regulation and that it did not bind the successors of the grantee or the Government. This view was clearly antagonistic to the view of their Lordships of the Privy Council in *Vencataswara Yettiappah Naicker* v. *Alagoomoottoo*[5] that a perpetual lease does not amount to a transfer within the meaning of S. 8 of the Regulation. In view of this pronouncement the later decisions have held that *Subbarayalu* v. *Rama Reddi*[15] was impliedly overruled (vide *Kondappa Naik* v. *Annamalai Chetti*[16] and *Muttu Viran Chetty* v. *Rani Kattama Natchiyar*[17]).

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1. (1902) I. L. R. 26 M. 389. 5. (1861) 8 M. I. A. 327 (P.C.).
13. (1899) I. L. R. 22 M. 438. 14. (1863) 3 M. H. C. R. 35.
15. (1863) 1 M. H. C. R. 141. 16. (1869) 4 M. H. C. R. 396.
17. (1869) 4 M. H. C. R. 463.

The principle was applied to grantees holding perpetual grants subject to the payment of a small rent under the name of jodi, poruppu or kattubadi and they were declared to be only permanent lessees and not owners. The term "owner" as defined in Markby's *Elements of Law* was quoted with approval. "However numerous and extensive may be the detached rights, however insignificant may be the residue, it is the holder of the residue of the right whom we always consider as the owner." (Vide *Maharajah of Vizianagaram* v. *Collector of Vizagapatam*[2] and *Sri Rajah Inuganti Rajah Gopalarao* v. *Venkata Suryarao*[4].) The term 'owner' has not been defined in the Land Revenue Assessment Act. It would not be out of place to consider here the meaning of the terms 'owner' and 'transfer' used in similar enactments.

The Hereditary Village Offices Act (III of 1895) provides in S. 5 that 'the emoluments of village offices shall not be liable to be transferred or encumbered in any manner whatsoever.' In *Kshetrabaro Bissoyi* v. *Harikristna Naidu*[18] it was held following the Privy Council case of *Vencataswara* v. *Alagoomoottoo*[5] that a permanent lease of service Inam lands was not a transfer of proprietary right of ownership. The case was followed with approval in *Kumara Peda Subbayya* v. *Chinnappa*[19] and *Veeraswami Mudali* v. *Palaniappan*[20].

The Privy Council has also repeatedly held that an Inam grant or a permanent lease of a portion of the zemindari is not a transfer of ownership so as to deprive the Zemindar of his mining right in the sub-soil without express words in the grant to that effect. *Tituram Mukherji* v. *Cohen*[21], *Hari Narayan* v. *Sriram Chakravarti*[22], *Durga Prasad* v. *Braja Nath*[23] and later cases.

The definition of the term 'Landholder' in S. 3, cl. (5) of the Madras Estates Land Act includes a person 'owning' an estate or part thereof. Numerous decisions of the Madras High Court had to advert to the meaning of the term 'own' while deciding whether a post-settlement minor Inamdar paying a

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2. (1914) I. L. R. 38 M. 1128 : 27 M. L. J. 278.
4. (1922) 44 M. L. J. 64. 5. (1861) 8 M. I. A. 327 (P. C.).
18. (1909) I. L. R. 33 M. 340 : 20 M. L. J. 417.
19. (1914) 28 M. L. J. 303. 20. (1923) 46 M.L.J. 515.
21. (1905) L.R. 32 I.A. 185 : I.L.R. 33 Cal. 203 : 15 M.L.J. 379 (P.C.).
22. (1910) L.R. 37 I.A. 136 : I.L.R. 37 Cal. 723 : 20 M.L.J. 569 (P.C.).
23. (1912) L. R. 39 I.A. 133: I.L.R. 39 Cal. 696 : 23 M.L.J. 26 (P.C.).

small quit-rent was a landholder as defined in S. 3, cl. (5). The decisions, however, are not uniform.

In *Mahant of Balaji Mutt* v. *Suryanarayana Patnaik*[24] Wallis, C. J., held following the decision in *Maharajah of Vizianagaram* v. *Collector of Vizagapatam*[2] that so long as the full owner in making a grant reserves an interest to himself however small it be, he and his successors continue to be the owners and that there is no reason to attribute a different meaning under the Estates Land Act. But Sadasiva Aiyar, J., held the contrary view that the Zemindar was the higher owner but that the grantee was still an owner in the ordinary sense of the term. In the Letters Patent Appeal (*Mahant of Balaji Mutt* v. *Suryanarayana Patnaik*[25]) which followed both Ayling and Kumaraswami Sastri, JJ., concurred in holding that the first clause 'owning an estate or part thereof' did not apply though they differed as to the applicability of the latter clause in S. 3, cl. (5).

In *Yeditha Bhupatiraju* v. *Bhavaraju Venkataratnam*[26] the grant was held to be in the nature of a permanent lease and Spencer and Odgers, JJ., held following the Privy Council that the lessee was not an owner.

In the Full Bench case *Jarugumilli Brahmayya* v. *Chellaghali Achiraju*[27] Schwabe, C.J., and Devadoss, J., held that the reservation of a portion of the quit-rent or jodi did not make the grantee an owner while Venkatasubbarao, Phillips and Oldfield, JJ., held the contrary. The decisions in the earlier cases quoted above were distinguished as applying only to the particular enactment therein referred to. It is submitted that in spite of the conflict above referred to, it is reasonable to hold that a permanent lessee and an Inamdar paying a favourable quit-rent whose legal status is analogous to a permanent lessee are not owners in the legal sense of the term. As such, permanent lessees or Inamdars paying a favourable quit-rent or jodi are not owners under S. 2 of the Land Revenue Assessment Act and separate registration of their holdings cannot take place.

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2. (1914) I. L. R. 38 M. 1128: 27 M. L. J. 278.
24. 1920 M.W.N. 303. 25. (1921) I.L.R. 44 M. 677: 41 M.L.J. 97.
26. (1921) 41 M.L.J. 512.
27. (1922) I.L.R. 45 M. 716 : 43 M. L. J. 229 (F.B.).

The second important condition for separate registration and assessment is that the land should be a portion of the permanently settled estate of the plaintiff. The Act can have no application to cases where the entire estate is sold or alienated but only to those cases where parts thereof are sold or alienated and the revenue has consequently to be apportioned. Lands granted after the permanent settlement are portions of the estate out of which they are carved. The difficulty often arises with reference to pre-settlement grants. The Regulation was passed in 1802 and it is a question of fact in each case whether the land was included in the assets of the zemindari at the time of the settlement and peishcush fixed thereon. S. 4 of the Permanent Settlement Regulation clearly excludes from the settlement all Lakhiraj lands or lands exempt from the payment of public revenue and all other lands paying only favourable quit-rents. The glossary appended to the Fifth Report defines Lakhiraj lands as lands held rent free or lands the Government dues from which are assigned to any person for his own benefit or appropriated to any public service.

In *Koppi Reddi Nokayya* v. *Mandalekka Bheemanna*[28] Ramesam, J., has classified the lands so excluded from the operation of settlement under S. 4 into three classes: (1) Lands granted on condition of rendering public service—hereditary village service inams; (2) Sarvadumbala Inams, and (3) Inams granted on favourable quit-rent.

The presumptions arising from the date of the grant and the scope of the Permanent Settlement Regulation will be dealt with later. The division referred to above was followed in later cases *Varahaliah* v. *Venkata Suryanarayana*[29] and *Lakshmi Venkayamma* v. *Secretary of State*[30]. Observations to the contrary of Wallace, J., in S. A. No. 355 of 1922 were dissented from in the latter case. But nothing prevents the Government from settling with the Zemindar and including even Lakhiraj lands if they considered it expedient or proper (*vide* observations in the *Venkatagiri* case[31]). In *Narayanaswami* v. *Boda Thammayya*[32] the village Narava in the Vizianagaram zemindari was held to be a Mokhasa grant and included in the assets of the zemindari.

28. (1922) 45 M. L. J. 91.
29. (1923) 18 L. W. 324: 75 I. C. 465: 1923 M. W. N. 732.
30. A. I. R. 1929 M. 399: 117 I. C. 292.
31. (1916) 2 M. W. N. 96.
32. 1930 M. W. N. 945.

The case of grants reserving personal services to the Zemindar was dealt with in a series of decisions of the Madras High Court and it was held that 'the Government would not have allowed any portion of the revenue in consideration of personal services to be rendered to the Zemindar'. (*Rajah Nilmoney Singh* v. *Government*[33], *Rajah Nilmoney Singh* v. *The Government and Beer Singh*[34], *Venkata Rangayya Apparao* v. *Appalarazu*[35], *Rajah Parthasarathi Appa Rao* v. *Secretary of State*[36] and other cases.) In this connection, it is desirable to consider the grants in the Nuzvid and Venkatagiri zemindaries.

With reference to the Nuzvid mokhasas, the Circuit Committee in 1768 in a note to the Abstract of the Revenue Collections in the Nuzvid zemindari state that 'the mokhasa villages and grants being immediately under the Zemindar and given or resumed when he pleases are included in the Government collections'. Mr. Taylor, the Inam Commissioner, in 1860, considered the scope of the reports of the Circuit Committee as well as of the Special Commissioner for the Nuzvid and Charamahal zemindaries, and came to the conclusion that the revenues of the mokhasa villages were included in the assets of the zemindari. Since then, the Privy Council and the Madras High Court have repeatedly held that the mokhasas of Nuzvid were included in the assets of the zemindari though the question as to their resumability depends on the facts of each case. (Refer *Venkata Narasimham* v. *Sobhanadri*[37], *Sri Rajah Parthasarathi Appa Rao* v. *Secretary of State*[36], *Lakshmi Narasimham* v. *Veerabhadrudu*[38] and *Gopisetti Veeraswami* v. *Sagiraju Seetharama Kantayya*[39].)

The zemindaries of Venkatagiri, Kalahasti and Karvetnagar were originally granted on military tenure and the Zemindars were bound to maintain an armed force for the assistance of Government in times of disorder or rebellion. The military service attached to them was commuted into a money payment at the permanent settlement of 1803. The peishcush was not fixed upon the assets of the estates but was only a portion of the cost of the zemindari's military establishment. The sanads granted to them are silent about Lakhiraj

33. (1866) 6 W. R. 121. 34. (1872) 18 W. R. 321.
35. (1910) 20 M. L. J. 728. 36. (1913) I.L.R. 38 M. 620: 26 M.L.J. 39.
37. (1905) L. R. 33 I. A. 46: I. L. R. 29 M. 52: 16 M. L. J. 1 (P.C.).
38. (1923) 19 L.W. 671: 1924 M.W.N. 244. 39. (1926) 51 M. L. J. 394.

lands and lands on favourable quit-rents. In fact the assessment and sanads do not refer to the Permanent Settlement Regulation. The peishcush having been so fixed on the whole of the estate, the Courts have held that the Government have no right to resume the inams or impose further assessment on such lands. (*Secretary of State* v. *Maharaja of Venkatagiri*[40].)

The inclusion or exclusion from the assets is thus a question of fact in each case. The Deshpandya Inams of the Pithapuram zemindari have now been held to be included in the assets of the zemindari[41]. The decision of Devadoss, J., in *Malyala Surayya* v. *Venkata Kumara Mahipathi Suryarao*,[42] which held that the russums alone were included and not the inams was upset in the Letters Patent Appeals that followed, though their liability to be separately registered would be still open to doubt as their Lordships deleted the words 'Post-settlement Inamdars and Landholders' from the Record of Rights Register and also negatived the occupancy rights of the tenants.

Wherever the original grants are available and point to a date anterior to 1st July, 1802, an important question is raised as to whether any presumption arises that the grants were included in the assets of the zemindari. The Circuit Committee was appointed in 1778 and reported on the state of affairs in the Northern Circars up to the end of 1784. Ramesam, J., in *Koppi Reddi Nokayya* v. *Mandalekka Bheemanna*[28] expresses the opinion that the accounts of the Circuit Committee, though they were the nearest in date available to the Government for the purpose of settlement, did not raise a presumption that all grants subsequent were excluded from the settlement. On the other hand, the Regulation not having expressly excluded such grants in 1802, it must be presumed that 'the Regulation and the sanads granted under it speak from their dates (1802) and all grants prior to 1802 were *prima facie* excluded from the settlement'. This no doubt is a rebuttable presumption but affords at any rate a strong piece of evidence that the lands in question were excluded from the permanent settlement (refer also *Varahaliah* v. *Sri Rajah Vatsavaya Venkata Suryanarayana Jagapathiraju*[43]). The decision of Ramesam, J., has been followed in later cases

28. (1922) 45 M. L. J. 91.
40. (1916) 31 M. L. J. 97 : 4 L. W. 133 (P. C.).
41. L. P. As. Nos. 167 to 174 of 1925.
42. (1924) 48 M. L. J. 577.
43. (1923) 18 L. W. 324.

Lakshmi Venkayamma v. *Secretary of State*[44] and *Narayanaswami* v. *Boda Thammayya*[45]. The directions given to the Collector also point out that the list of grants were directed to be brought up to the date of the permanent settlement (refer the Fifth Report, Vol. I). Sundaram Chetty, J., in S. A. No. 689 of 1925 also reiterates the presumption noted above. The burden would thus lie upon the Zemindar to show that grants of lands prior to 1st July, 1802, were in fact included in the assets of the zemindari and that he is entitled to get them separately registered under the Land Revenue Assessment Act.

A presumption was laid down in *Secretary of State* v. *Kirtibas Bhupati*[46] by the Privy Council that the lands within the ambit of the zemindari were *prima facie* included in the assets. But this presumption was restricted only to cases between the Government on the one hand and the Zemindar on the other, in *Vobilineni Subba Rao* v. *Rajah of Pithapur*[11] and it was held that the Zemindar has to prove that the income from the lands was included in the assets at the time of the settlement in all cases where he wants to have separate registration of such lands. Their Lordships Waller and Madhavan Nair, JJ., observe that though the lands of the defendant lie geographically within the ambit of the zemindari there is no presumption that the income from them was included in the computation of assets at the time of the Permanent Settlement.

The Privy Council in *Hurryhur Mookhopadhya* v. *Madub Chunder*[47] laid down that the burden of proving that a particular land was included in the Mal assets of the zemindari lay upon the Zemindar. In *Jagdeo Narain* v. *Baldeo*[48] it was held that once the landlord proved that the land which was sought to be held rent free lay within his *regularly assessed* estate or mehal, the onus would be shifted. Walmsley, J., in *Sashi Bhusan* v. *Kazi Abdulla*[49] interpreted the dictum of the Privy Council as meaning that it would not be sufficient to show merely that the lands lay within the ambit of the zemindari but that it must also be shown that the land was a portion of the regularly assessed estate or mehal. This was followed by the Calcutta High Court

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11. (1926) 53 M. L. J. 400.
44. A. I. R. 1929 M. 399: 117 I. C. 292. 45. 1930 M. W. N. 945.
46. (1914) L. R. 42 I. A. 30: I. L. R. 42 C. 710: 28 M. L. J. 457 (P.C.).
47. (1871) 14 M. I. A. 152 (P. C.).
48. (1922) L. R. 49 I. A. 399: I. L. R. 2 Pat. 38: 45 M.L.J. 460 (P.C.).
49. (1923) 28 C. W. N. 143.

in a recent case *Makhan Lal* v. *Rup Chand*[50]. But the Privy Council in *Raj Kumar Gobinda Narayan Singh* v. *Sham Lal Singh*[51] laid down that 'the presumption arising from the Permanent Settlement being in favour of the Zemindar, when any claim is made against him in respect of lands which were included in his zemindari, the burden of proving his title lies upon the claimant'. The earlier Privy Council decision in *Ranjit Singh* v. *Kali Dasi Debi*[52] was followed and the Government does not seem to be a party to the suit. The suit was one for a declaration of the rights to the sub-soil of a village which the Privy Council has repeatedly held would not pass to the grantee in the absence of express words to that effect. The case has no reference to the separate registration of a portion of the estate or to the inclusion of the income thereof in the assets at the time of the Permanent Settlement. The presumption thus raised in *Vobilineni Subba Rao* v. *Rajah of Pithapur*[11] still holds good in cases of separate registration under the Land Revenue Assessment Act. It is reasonable also that the plaintiff claiming the special right of separately registering the lands of the defendant and apportioning the peishcush payable thereon should make out the circumstances under which the said relief can be claimed. Again, the fact of exclusion or inclusion in the assets being within his special knowledge depending upon the sanad and the assets register, the burden should be placed upon the Zemindar in such cases. The burden of proof as between the Zemindar and the Government would be rightly placed on the latter as laid down by the Privy Council in *Secretary of State* v. *Kirtibas Bhupati*[46].

PROCEDURE IN SUITS FOR SEPARATE REGISTRATION.

The alienor or alienee of a portion of a permanently settled estate or the representative of such alienor or alienee may apply to the Collector of the District for its registration in the name of the alienee and for its separate assessment in respect of land revenue (*vide* S. 1). The terms "alienor" and

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11. (1926) 53 M. L. J. 400.
46. (1914) L. R. 42 I. A. 30: I. L. R. 42 C. 710: 28 M. L. J. 457 (P. C.).
50. (1929) 51 C. L. J. 41.
51. (1931) 61 M. L. J. 9 (P. C.).
52. (1917) L. R. 44 I. A. 117: I. L. R. 44 C. 841: 32 M. L. J. 565 (P. C.).

"alienee" are reciprocal and imply *only those parties between whom the reciprocal relation exists.* The alienation need not be by a person whose name has been entered on the Collector's Register. (Refer *The Collector of Salem* v. *Peer Batcha Sahib*[53].) It does not imply all parties to any transaction which may form a link in the alienor's title. Partition among the members of a family is not an alienation *inter se* as the estate is left intact though there is a mutual transfer of interest between the members of the family (vide *Venkatakrishna Rao* v. *Venkata Jagga Rao*[54]).

The Collector shall, on application, publish a notice in the official Gazette in three successive issues that separate registration would be made if sufficient cause is not shown to the contrary within sixty days from the date of notice. Notice of the enquiry shall also be issued to any alienor or alienee who has not joined in the application (S. 2). If the *parties to the alienation concurred* in applying for separate assessment and if no objection is taken by any person interested in the estate or being taken, is disallowed by the Collector, the Collector shall proceed with the separate registration and assessment thereof. The Collector cannot decline to exercise jurisdiction but must proceed to enquire into the objections raised by the parties and pass proper orders thereon. Vide *The Collector of Salem* v. *Peer Batcha Sahib*[53]. The separate assessment so fixed will be deducted from the peishcush and from that date the estate will not be liable for the assessment on the separated portion and *vice versa* (Ss. 3 and 4).

Concurrence of parties to the alienation is essential and, in its absence, the Collector has no power to separately register the holding. The claimant can only enforce the same or a person aggrieved can obtain a declaration that it ought not to have been made by a declaratory suit in a civil court under Ss. 5 and 6 (*Fischer* v. *Secretary of State*[55]; *Narayanaswami* v. *Sree Rajah Vellanki Srinivasa Jagannadharao*[56]). The suit has to be brought within one year of the date of the order of the Collector allowing or refusing to allow separate registration of the holding. (*Vide* Art. 14 of the Indian Limitation Act.)

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53. (1906) I. L. R. 30 M. 106: 16 M. L. J. 468: 1 M. L. T. 421.
54. (1898) 9 M. L. J. 66.
55. (1896) I.L.R. 19 M. 292; (1898) L.R. 26 I.A. 16: I.L.R. 22 M. 270 (P.C.).
56. (1909) I. L. R. 33 M. 189.

An application before the Collector might be withdrawn by the party before it is finally heard though no provision has been made in the Act to provide for such cases. Act I of 1876 professes in respect of its subject-matter to be exhaustive and complete in itself (vide *Secretary of State* v. *Fischer*[1]). The Civil Procedure Code can obviously have no application. If such an application is withdrawn with the permission of the Court and with liberty to file a fresh one, there is no reason why it should bar a second application for separate registry. But, however, if no such permission is obtained, the second application would be barred under general principles of law, analogous to *res judicata*. The withdrawal prayed for must be by reason of a formal defect or other cause analogous to a formal defect. An apprehension of failure would not be a sufficient cause. The power of entering a non-suit as in England does not seem to have been possessed by Courts in India.

In suits consequent upon an adverse order under the Land Revenue Assessment Act, the Collector is a necessary party; for without him no declaration for separate registration can be effectively given so as to bind the Government. It has been held that he is a necessary party even in suits for mutation of names in the Revenue Registers. (*Mangamma* v. *Timmapaiya*[57], *Viraswami* v. *Ramadoss*[58] and *K. Sivamma* v. *Venkataramanamurty*[59].) But the position of the Government is not that of a contesting party in the suit. He is only a *pro forma* party without whom the necessary declaration cannot be given. In *Fischer* v. *Secretary of State*[55] it was held by the Privy Council that when once the Collector exercised the powers vested in him under the Land Revenue Assessment Act, the Government have no further right to interfere. Subject to the right of suit under Ss. 5 and 6, the order is final. The apportionment made by him can, however, be questioned before the Board of Revenue within 90 days from the date of the declaration of assessment (S. 7) and the decision of the Board thereon is final. The Governor in Council can, however, readjust the same where there is fraud or material error in the apportionment thereof. The provision that the apportionment

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1. (1902) I. L. R. 26 M. 389 at 392.
55 (1898) L. R. 26 I. A. 16. I. L. R. 22 M. 270 (P. C.).
57. (1866) 3 M. H. C. R. 134. 58. (1891) I. L. R. 15 M. 350: 1 M. L. J. 26.
59. (1902) 19 M. L. J. 331 (2).

made by the Collector shall have no validity until it has been confirmed by the Board of Revenue (S. 46 of Act II of 1864 and S. 1 of Act I of 1876) has, however, been deleted by Act VIII of 1914.

It has been also held that in suits for a declaration of the right to separate registration, no damages can be awarded against a party for his refusal to consent as there is no such provision in the Land Revenue Assessment Act. (*Narayanaswami Naidu* v. *Sree Rajah Vellanki Srinivasa Jagannadharao*[56]). Nor has the civil court any jurisdiction to question the apportionment made by the Collector under the Act though it can decide matters of contribution between the parties (*Muthammal* v. *Secretary of State*[60]).

As has been already stated, the non-registration has not the effect of rendering the alienation invalid between the parties, though it will not be recognised by the Government. 'Unregistered transfers are thus invalid only as against the Government though valid as between private parties' (*Subramaniu* v. *Mahalingasami*[61] following *Mangamma* v. *Timmapaiya*[57]). The registered pattadar remains a landholder and becomes a defaulter within the meaning of the Revenue Recovery Act (II of 1864). The scope of Regulation XXV of 1802 was clearly declared by their Lordships of the Privy Council in *Muttu Vaduganadha* v. *Dorasingha*[62] and *Vizianagaram Maharaja* v. *Suryanarayana*[63]. It was framed with a view to secure the land revenue only and the restrictions on alienation were also enacted with the same object. The Interpretation Regulation IV of 1822 makes the point clear by declaring that the earlier Regulation was not intended to 'define, limit, infringe or destroy the actual rights of any description of landholders or tenants'.

It was at one time thought that a landholder whose name has not been registered under Regulation XXVI of 1802 was not entitled to proceed against his tenants under Act VIII of 1865 (Rent Recovery Act) and as such separate registration was absolutely necessary (*Valamaramayyan* v. *Virappa*[64];

56. (1909) I. L. R. 33 M. 189: 1910 M. W. N. 30: 5 I.C. 318.
57. (1866) 3 M. H. C. R. 134.
60. (1913) 24 M. L. J. 405.
61. (1909) I. L. R. 33 M. 41 : 19 M. L. J. 627 (F. B.).
62. (1881) L. R. 8 I. A. 99 : I. L. R. 3 M. 290 (P. C.).
63. (1886) L. R. 13 I. A. 32 : I. L. R. 9 M. 307 (P. C.).
64. (1882) I. L. R. 5 M. 145.

Ayyappa v. *Venkatakrishnamarasu*[65]; *Raghava Reddi* v. *Kanni Gramani*[66]). The contrary was held in *Subbu* v. *Vasanthappan*[67] and the Full Bench decision *Dharmakartha of Tinnanore Temple* v. *Luchmi Doss*[68] has set the conflict at rest and clearly held that there is no enactment which requires a landholder to be registered before he can exercise the powers conferred by Act VIII of 1865. This Act has been repealed by the Madras Estates Land Act and there is nothing in the latter enactment also which requires that a landholder should be registered before he can exercise the powers conferred under the said Act.

K. RAGHAVACHARYULU, M.A., B.L.,
Vakil, Cocanada.

SUMMARY OF ENGLISH CASES.

ATTORNEY-GENERAL v. SMETHWICK CORPORATION, (1932) 1 Ch. 562.

Corporation—Statutory powers—Statutory duties requiring large amount of printing, bookbinding, etc.—Resolution of Corporation to establish its own printing works—Expenditure from out of rate fund—If ultra vires.

A Corporation, whose multitudinous and administrative duties involved an annual expenditure of 5,000*l.* to 6,000*l.*, resolved to establish its own printing establishment on its own premises and work it with its own staff. This was resolved upon after a committee appointed for the purpose recommended that "the establishment of such a department is desirable, and, if developed along reasonable lines, is likely to prove an economical proposition". The proposal involved a capital outlay of 1,000*l.* and an annual expenditure of 1,426*l.* The Attorney-General at the instance of a ratepayer brought an action to restrain the Corporation from spending for this out of the rate fund.

Held, by the Court of Appeal (affirming Eve, J.), that if the Corporation go outside the powers conferred by the statute, there was power for bringing up an improper payment, or order for payment of money for consideration by the Court. But this doctrine of *ultra vires* must be reasonably and not unreasonably understood and applied and that as the enterprise was incidental to or consequential upon those things which the Legislature has authorised, it ought not to be held to be *ultra vires.*

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65. (1892) I. L. R. 15 M. 484 : 2 M. L. J. 219.
66. (1899) I. L. R. 23 M. 221. 67. (1885) I. L. R. 8 M. 351.
68. (1903) I. L. R. 26 M. 589 (F. B.).

Attorney-General v. *Great Eastern Railway Co.*, (1879) 11 Ch. D. 449, and on appeal, (1880) 5 A C. 473, relied on.

The Corporation cannot cater for the public or endeavour to trade and make a profit. But it cannot be said that they must not have any printing done on their own premises, especially if that saves the ratepayers' money.

In re PARK: PUBLIC TRUSTEE *v.* ARMSTRONG, (1932) 1 Ch. 580.

Will—"Power to donee to appoint to any object except himself"—If definite and valid.

After a specific devise to his sister *A*, a testator bequeathed all the residue to his trustee upon trust to pay the annual income therefrom "to such person (other than herself) or persons or charitable institution or institutions and in such shares and proportions as the defendant *A* should from time to time during her lifetime direct in writing, and from and after her decease in trust as to both capital and income . . . for the Imperial Merchant Service Guild for the benefit of their stress fund absolutely". The question arose if the power was valid.

Held, that if a testator creates a trust he must mark out the metes and bounds which are to fetter the trustees, or as has been said, the trust must not be too vague for the Court to enforce; but here the trust was definite. If *A* designates a definite object in writing, that will be the object to which the trustees or the Court will apply the income; in so far as there is no such direction the charitable gift to the stress fund of the Imperial Merchant Service Guild will operate. The clause in the will which gives *A* power to divert the income during her lifetime to any object other than her own personal use is not bad. "A power to *A. B.* to appoint to an object except himself" is not invalid for a power to appoint to any one except certain persons named or indicated, is good. There is no authority holding that such a restriction should not be on the donee himself.

Attorney-General v. *National Provincial Bank*, (1924) A. C. 262 distinguished as a case where the trustees were in effect left to make a will for the testator.

Platt v. *Routh*, (1840) 6 M & W. 756, reported in the House of Lords as *Drake* v. *Attorney-General*, 10 Cl. & F. 257, relied on.

In re GEORGE DUDDELL. ROUNDWAY *v.* ROUNDWAY, (1932) 1 Ch. 585.

Will—Residuary bequest to such person as W *and* B *shall by will direct and appoint—Joint will by* W *and* B*—Death of* W *during* B's *lifetime—No revocation by* B*—Joint will if effective —Effect of.*

A testator devised and bequeathed the residue of his estate upon trust for his wife for her life and after her death in trust for his two children *W* and *B*, "for their sole and separate use during the term of their natural lives. . . . and after the decease of the said *W* and *B* . . to such persons and to such ends and purposes as the said *W* and *B* shall by will direct and appoint, and in default of such appointment to my right heirs for ever". After the death of the testator, *W* and *B* executed a joint will, exercising the power of appointment under the will. *W* died in 1917 having made a separate will confirming the joint will and probate was granted of his separate will and the joint will as *W's* last testament. *B* who survived him did not attempt to revoke the joint will.

Held, that a power of appointment given by will to two persons is valid and exercisable. The testator is not thereby seeking to do anything that the law did not permit. The joint will of *W* and *B* is an appointment by them jointly according to the testator's wishes. On the death of *W* no property passed, no property vested and the appointment could not have any immediate effect whatsoever. But it was an appointment which was then inchoate and on the death of *B* without revoking it, the joint will on being admitted to probate will be a direction and appointment which will comply with the requirements of the testator.

Observation to the contrary of Lord Mansfield in *Darlington (Earl)* v. *Pulteney*, (1775) 1 Cowp. 260, not followed as *obiter*.

In re JOHN DRY STEAM TUGS, LIMITED, (1932) 1 Ch. 594.

Company—Voluntary winding up—Surplus assets—Right of preference shareholders to share pari passu *with ordinary shareholders.*

A Company was incorporated in 1909 with a nominal capital of 25,000*l*. divided into 1,250 preference shares of 10*l*. each and 1,250 ordinary shares of 10*l*. each, out of which a small proportion only were fully paid. In 1929 the Company went into voluntary liquidation, and after payment of all debts and collecting all the assets and repaying to the preference and ordinary shareholders all the capital paid up on their shares, had surplus assets available for distribution. By cl. (5) of the Articles of Association, the preference shareholder had the rights (*i*) to a fixed cumulative dividend at the rate of 5 per cent. per annum on the capital for the time being paid up on the said preference shares respectively and after paying or providing for the payment of a dividend for such year at the same rate on the capital for the time being paid up on the ordinary shares to an additional half per cent. calculated on the same basis for each 1 per cent in excess of 5 per cent paid on the ordinary shares, and (*ii*) to have priority in a winding up both as to cumulative dividend aforesaid and return of capital over all other shares. The question was if in

addition to the rights under cl. (5), the preference shareholders had right to claim rateably with the ordinary shareholders a share in the surplus.

Held, that cl. (5) is not exhaustive but only expressive of certain rights which the preference shareholders have. The first right regards it as a going concern and the second in the course of liquidation. Nothing is said as to the distribution of any assets still remaining for distribution after the capital has been repaid and in the absence of a provision to the contrary, these assets ought to be shared by all the contributories. The question really is whether the memorandum and articles contain an exhaustive delimitation of the rights of the preference shareholder.

Anglo-French Music Co., Ltd. v. *Nicoll,* (1921) 1 Ch 386, In re *Espuela Land and Cattle Co.,* (1909) 2 Ch. 187 and In re *Fraser and Chalmers, Ltd.,* (1919) 2 Ch. 114, followed.

In re JOHN SINCLAIR LIMITED'S TRADE MARK, (1932) 1 Ch. 598.

Trade Mark—Trade Marks Act, S. 22—Assignment of Trade Mark—Goodwill, meaning of—Assignor not a party—Registration of Mark if can be expunged from the Register.

Carreras, Ltd., tobacco manufacturers, registered in 1923 a trade mark in respect of tobacco, whether manufactured or unmanufactured. In 1930 that mark was assigned to John Sinclair. Ltd., by an assignment the operative part of which was that *C* assigned to *S* "all the trade mark now standing upon the Register of Trade Marks, and therein numbered 437,870 in class 45, together with the goodwill of the business concerned in the goods with respect to which the said trade mark is registered". Though the assignment was general, it was not intended to assign the business of selling and dealing in manufactured and unmanufactured tobacco but only the cigarette business of Carreras. Another tobacco company applied to expunge the registration in favour of *S* on the ground that the assignment was invalid as contrary to S. 22. S 22 says that "A trade mark when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in the goods for which it has been registered and shall be determinable with that goodwill.

Held, (by the Court of Appeal confirming Maugham, J.), that S. 22 does not permit a severance of the goodwill but indicates that the goodwill concerned in the goods for which the mark has been registered is a single goodwill. The present trade mark was registered in respect of the whole of class 45, which is "tobacco, whether manufactured or unmanufactured". No limitation is introduced there which confines the use of the mark to cigars or cigarettes and the assignment which does not assign the goodwill of the whole tobacco business but only in cigarettes is invalid.

On the relief to be granted, held by Maugham, J., that if the assignment were recent, the proper form might have been simply to expunge the notice of the assignment, the result of which would have been to leave the assignor on the register as the owner of the mark; but as the assignees have altered the size of the trade and increased it, the proper order was to order the mark to be expunged following *Bowden Wire, Ltd.* v. *Bowden Brake Co., Ltd.*, (1914) 31 R. P. C 385

But held by the Court of Appeal that for an order to be made expunging the mark, which, if the assignment is disallowed, would seem to remain the property of Carreras, Ltd., it would be necessary to have Carreras before the Court The mere fact that they were aware of these proceedings will not suffice. The proper order can only be "simply to expunge the notice of the assignment".

In re JONES: MEACOCK *v.* JONES, (1932) 1 Ch. 642.

Will—Legacy to children contingent on attaining 25 *years—No provision for maintenance—Interest on legacy—If can be allowed as maintenance to the children.*

Where a legacy was given in favour of the testator's children contingent on their attaining 25 years,

Held, the general rule of construction in regard to contingent legacies is that such legacies do not carry interest until the time for payment. But it has certain exceptions, one where the legatee is an infant child of a testator or an infant to whom the testator has put himself in *loco parentis.* In such cases it may carry interest if there is no other provision made by the will for the maintenance of the legatee. It is not necessary that the contingency must be the attainment by the child of full age or marriage under that age. The principle is that in those cases the Court infers that the testator intended that the child should be maintained.

In re *Abrahams,* (1911) 1 Ch. 108, discussed.

THE OCEAN COAL CO., LTD. *v.* THE POWELL DUFFRYN STEAM COAL CO., LTD., (1932) 1 Ch. 654.

Company—Private company—Special restriction on transfer of shares—First offer to be to members—Offer of a number of shares—Members accepting to take some of them—If good acceptance.

By the articles of association of a private company incorporated under the 1908 to 1917 Companies Acts, it was provided that the holder of any shares desiring to sell or transfer any of his shares to any person other than a registered holder of shares in the company shall notify in writing

to the Board the number of shares proposed to be transferred, the price proposed, and the name, etc., of the proposed transferee; that the Board shall thereupon offer the shares to the other shareholders of the company at the price so named, that the shares shall be sold to the parties so accepting the offer at that price, but that if they are not so accepted by any member, the holder may sell them to an outsider. A shareholder holding 3,00,000 shares offered to sell 1,35,000 of his shares at 2*l*. per share. The other shareholders accepted to buy only 5,000 of them at that price but the holder refused to so sell piecemeal.

Held, that the offer was "I am willing to sell 1,35,000 shares at a price of 2*l*. per share" and not "I am willing to sell one share at 2*l*. up to the total number of 1,35,000" It can only be accepted by one or more of the shareholders by conjointly saying "we will take a transfer of the 1,35,000 shares". The offer is not accepted within the meaning of the article unless one or more members agree to take up the whole number offered. The Article has not the effect of turning what is an offer to sell a given number of shares into an offer to sell one share at the price stated for the whole number offered.

In re RUSSIAN AND ENGLISH BANK, (1932) 1 Ch. 663

Company—Foreign company—Dissolved before 1929—*If can be wound up under the Companies Act,* 1929, *Ss.* 337 *and* 338.

A company incorporated under the Laws of Russia in 1910 was dissolved before the date on which the Companies Act of 1929 came into operation as held in *Russian and English Bank* v. *Baring Brothers & Co., Ltd.,* (1932) 1 Ch. 435. Three persons claiming to be creditors of the company presented a petition for the winding up of the company under S. 338 of the 1929 Act. The debt was disputed by the company.

Held, a company which owes its existence to foreign law is an unregistered company within the meaning of S 338. It was decided on the language of the relevant section of the 1862 Act that an unregistered company might be wound up under its provisions and S 338 (2) did not intend to alter the law as it had existed under the Acts of 1862 and 1908

As a general rule a disputed debt may not be the basis of a creditor's petition but where the persons whose debt is disputed would otherwise be without redress, it can be relied on. Their action on the debt could not be proceeded with as the foreign company have no longer any existence and as such the only course open to them is to wind up the company and prove the debt before the liquidator.

In re BRITISH TRADE CORPORATION, LIMITED, (1932) 2 Ch. 1.

Bill of Exchange—Drawer and drawee same—Option by holder to treat the bill as promissory note—"In the body of it made pay-

able at a particular place"—S. 87—Meaning of—Address of drawee at bottom of bill—If "in the body of it".

On March 23, 1920, the branch of the B Co. at Batoum drew in favour of *M* a document in the following form:—"At sight pay this sole exchange to the order of *M* the sum of 1000*l*. sterling value received which place to account No. 2. Signed by the manager and accountant for the B Co." It was addressed to B Co., London. It was successively indorsed over to the order of *I*, *J* and *K*. On December 20, 1923, *K's* agent presented the document for payment at London office of B Co. but payment was refused on the ground that "all endorsements require banker's certification and indemnity required for mutilation". In 1926 the B Co. was voluntarily wound up and *K* put in a proof in the winding up in respect of the document. It was rejected as barred. *K* claimed to treat the document as a promissory note under S. 5 on the ground that the drawer and the drawee were the same person and contended that under S. 87 it must be presented for payment, that it was presented only on December 20, 1923, and the claim was not therefore barred. Section 87, sub-sec. (1) says that "where a promissory note is in the body of it made payable at a particular place, it must be presented at that place in order to render the maker liable. . "

Held, that "in the body of" the note must mean in the terms of the actual contract to pay which is contained in the note. The address at the bottom of the Head Office did not make it "in the body." No presentment was therefore necessary and the claim was barred. "To the B Co., London" were added to treat it as a bill of exchange.

In re BEALE'S SETTLEMENT TRUSTS: HUGGINS *v.* BEALE, (1932) 2 Ch. 15.

Trust—Trust for sale with consent of A *and* B*—Bankruptcy of* A*—Consent given by* B *but refused by* A*—Court if can order sale nevertheless—Trustee Act,* 1925, *S.* 57 *and Law of Property Act,* 1925, *S.* 30.

The Court has jurisdiction under S. 30 of the Law of Property Act, 1925 and S. 57 of the Trustee Act, 1925, to direct, in the exercise of its discretion, a sale by trustees for sale where the necessary consent cannot be obtained by reason of the refusal of the person to give it.

SHEFFIELD MASONIC HALL COMPANY, LIMITED *v.* SHEFFIELD CORPORATION, (1932) 2 Ch. 17.

Easement—Light—Room receiving ancient lights on two sides —New building on one side—Right to build—Extent of easement —Prescription Act, 1832, *S.* 3.

One of the rooms in a building was lighted by windows looking on to *S* Street and *E* Street on two sides of it. At the date of the

action all the windows of the room were ancient lights. In 1931 a high building was begun in *S* Street which was calculated to obstruct the light coming through *S* window. It was contended that where there are two open spaces each facing ancient lights to the same parts of a building on different sides of that building, the first builder is entitled to build to any height so long as the other window *E* lets in sufficient light.

Held, that the right in these cases is more what is described as *ne facias* in Roman Law. The dominant tenement is entitled to the benefit of a quasi covenant by the owner of the servient tenement precluding him from building in the normal case in such a way as to obscure the plaintiff's rights to a degree which would interfere with his comfortable enjoyment of his premises,—according to the habits and requirements of ordinary people—or cause a nuisance to the plaintiff in the enjoyment of his premises. In a case where there are two servient tenements, the rule cannot be that the first builder is entitled to build as he pleases on the footing of "first come, first served". The real nature of the restrictive obligation imposed upon the people facing those two windows is that they will not so build as by their joint action to cause a nuisance to the plaintiff. In other words, the owner of *S* can build to such a height as, with a similar building by the owner of *E,* will yet leave sufficient light for the plaintiff's room. The obligations by both owners are the same; neither has a greater obligation than the other.

Value of expert evidence in cases of this kind discussed.

In re ISABEL JOANNA JAMES: GRENFELL *v.* HAMILTON, (1932) 2 Ch. 25.

Charity—Bequest for establishing a Home of Rest—Valid charitable trust—Nature of persons to use the Home—Failure of trust—Procedure.

A testatrix by her will appointed *G* and *B* as executors and trustees thereof, and after providing for certain legacies, bequeathed certain property unto her trustees in trust to establish and maintain a Home of Rest for the Sisters of the Home of the Community of the Epiphamy at Truro, the Clergy of the Diocese of Truro and such persons as the Mother Superior for the time being of the Home of the Community shall nominate and appoint. The Mother Superior and Bishop of Truro were of opinion that the community would be unable to accept the devise às the interest accruing out of the fund would not be sufficient to maintain the Home. The executors thereupon applied to the Court for directions.

Held, that a gift of a fund or property for the purpose of founding and endowing a Home of Rest is in itself *prima facie* a charitable object. It may be that to provide a Home of Rest for those who are not in need of it would not be charitable; but *prima facie* the words "Home of Rest" indicate a Home which is

to provide relief for those who are in need of it. That being so, the trust is good, though some of the purposes to which the fund may be applied are not strictly charitable. The Mother Superior is to nominate and can nominate only such persons as are properly suitable to a Home of Rest as a charity. The fact that the words in the will are wide enough in themselves to enable her to appoint other persons does not prevent the whole gift from being charitable. If such a Home cannot be established or maintained, then the trust will be applied *cy pres*.

In re *Estlin*, (1903) 72 L. J. Ch. 687 and *Hunter* v. *Attorney-General*, (1899) A.C. 309, followed.

In re LEE, BEHRENS & COMPANY, LIMITED, (1932) 2 Ch. 46.

Company—Winding up—Pension to widow of managing director—Not confirmed by a general meeting of shareholders—No objection by any—If valid—Tests for validity of pensions—Whether reasonably incidental to the business or for benefit of the Company.

A private Company went into voluntary liquidation in 1931. One *S* was its managing director for many years and died in 1923. In 1928 the directors resolved to give *S's* widow an annual pension of 500*l*. The widow lodged a proof in the winding up for 8,000*l*., the capitalised value of the pension. The resolution was not confirmed by any general body meeting of shareholders. The articles of the Company expressly gave power to the directors to provide for the welfare of persons in the employment of the Company or formerly in its employment, and the widows and children of such persons, etc. The liquidator rejected the claim as *ultra vires* the directors' powers.

Held, on appeal, it is not that an arrangement of this nature for rewarding long and faithful service on the part of persons employed by the Company is not within the power of an ordinary trading Company. It was so expressly given also under its memorandum. But such grants involve an expenditure of the Company's money, and that money can be spent only for purposes reasonably incidental to the carrying on of the Company's business and the validity of such grants is to be tested by the answers to three questions:—(1) Is the transaction reasonably incidental to the carrying on of the Company's business? (2) Is it a *bona fide* transaction? (3) Is it done for the benefit and to promote the prosperity of the Company? In this case the gift was by the directors to one of their body and cannot be done unless authorised by the instrument which regulates the Company or by the shareholders at a properly convened meeting for the purpose. A director is not a servant of the Company nor is a managing director a person in the employment of the Company. The fact that the shareholders were few and individually assented to or were not likely

to object may preclude them individually but will not bind the Company or the liquidator.

In re *George Newman & Co.*, (1895) 1 Ch. 674, followed.

In re PRICE: TRUMPER *v.* PRICE, (1932) 2 Ch. 54.

Will—Specific legacy—Gift of "my 400l. five per cent. War Loan, 1929-1947"—Misdescription—No War Loans but War Bonds converted—If the converted Bonds passed under the gift.

A testatrix, not a woman of any great education, gave to her niece "my 400*l.* 5 per cent. *War Loan*, 1929-1947" but she never had any *War Loan*, though before 1925 she had acquired 400*l.* National *War Bonds*. Later on she converted her War Bonds into Conversion Stock and Treasury Bonds. The question was if these later Conversion Stock and Treasury Bonds passed to the legatee under the bequest of "War Loan" as *falsa demonstratio*.

Held, it was clear that the testatrix must have forgotten the correct description of her investments. The testatrix evidently regarded any investments she made for helping the country during the War as "War Loan". Even if it involves carrying the rule of *falsa demonstratio* further than it has yet been carried, it is proper to hold in this case that the clause operates to vest in the legatee the two sums under the Conversion Stock and Treasury Bonds.

In re MORGAN AND PROVINCIAL INSURANCE CO., LTD., (1932) 2 K. B. 70

Insurance—Motor lorry—Proposal—Answers to questions—If condition or description of risk.

M. and F. Co. were coal merchants carrying on business at *A.* They had effected a policy of insurance with P. Co., Ltd., in respect of a motor truck. The policy stated that the claimants had made the proposal and signed a declaration which it was agreed should be deemed to be of a promissory nature and effect and should be the basis of the contract as if incorporated in the policy. The following were the questions asked for by P. Co and answers given by M. and F Company: "State (*a*) the purposes in full for which the vehicles will be used, and (*b*) the nature of the goods to be carried. (*c*) Towns and localities where vehicles will be used." Answers: "(*a*) Delivery of coal; (*b*) coal; (*c*) Abercarn County." The P Co. agreed therefore to insure the M. and F. Company against liability for injury or damage caused by the use of the lorry or to the lorry itself. The M and F Company had used the lorry for carrying timber also and in fact on the day of collision the lorry carried both timber and coal but had discharged the timber earlier and at the time of the collision there was only coal in the lorry. In an action against the insurance company for damages due to the collision, the Company disclaimed liability stating that there was a warrant or promise that nothing but coal should be

carried and that inasmuch as timber was carried, the policy was invalidated, though the carriage of the timber in no way led to the collision.

Held, that the answers to the questions put by the insurance company did not amount to an undertaking by the assured that during the currency of the policy the insured vehicle would be used only for the purpose of carrying coal. They only meant that the vehicle should be insured only whilst it was engaged in carrying or delivering coal within Abercarn limits. They amount only to a description or definition of the risk intended to be insured against, and as the accident happened while the car was in the course of delivering coal and in Abercarn, it was within the risk at the time though prior to that it had carried timber or went outside the Abercarn jurisdiction.

Farr v. *Motor Traders Mutual Insurance Society*, (1920) 3 K.B. 669, followed.

Dawsons, Ltd. v. *Bonnin*, (1922) 2 A.C. 413 and *Roberts* v. *Anglo-Saxon Insurance Association*, (1927) 96 L.J.K.B. 590, distinguished

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IBERIAN TRUST, LIMITED *v.* FOUNDERS TRUST AND INVESTMENT CO., LTD., (1932) 2 K. B 87.

Practice—Order against Corporation to do an act within a time—Order not served till after the time expired—Order not stating the consequences of disobedience—Failure to do the act—Liability of the directors—Rules of Supreme Court, 1883, *O.* 41, *r.* 5, *and O.* 42, *r.* 31.

In an action against the defendant Company, an order was passed on 7th July, 1931, as follows:—"It is this day hereby adjudged and declared that the plaintiffs are entitled to the return by the defendants of the following shares, viz., 258,000 deferred shares and 11,180 preferred shares in R. Co., within 14 days from the date hereof." A copy of the order was served upon *H*, one of the directors on 19th August, 1931, and on *S* another director on 7th November, 1931. The order in both cases did not have an indorsement on it of a memorandum stating the consequences of disobedience as required by O. 41, r. 5. The defendant Company did not comply with the order. Thereupon a summons was taken out for leave to issue writs of attachment on *H* and *S* for disobedience.

Held, the attachment could not issue for the following reasons: (1) In order to constitute a contempt of Court for which the directors may be punished there must be wilful disobedience by them to do something which they have been ordered to do. But the order here does not direct the defendant Company to do anything. It does not even provide that the defendant Company shall return the shares. In re *Oddy*: *Major* v. *Harness*, (1906)

1 Ch. 93, relied on. (2) Even assuming the order directs the defendant to do an act, namely, to transfer the shares to the plaintiffs, the order could not be enforced by penal proceedings, because there can be no default in compliance with an order ordering something to be done within a certain time when the order was not served until after the time had expired. (3) The order did not contain an indorsement as required under O. 41, r. 5, calling the attention of the person ordered to do the act that the result of disobedience will be to subject him to penal consequences. (4) As the plaintiffs are not in a position to pursue the original remedy against the defendant Company, they cannot proceed against the directors, the remedy against whom is only an alternative one.

OCEAN ACCIDENT AND GUARANTEE CORPORATION, LTD. *v.* COLE, (1932) 2 K B. 100.

Road Traffic Act, 1930, *S.* 112, *Sub-S.* (3)—*Motor car insurance—Payment of premium on* 11*th—Receipt renewing policy as from 3rd—If false statement—Knowledge of falsity.*

Prior to June 3, 1931, an Insurance Company issued to *P* a public liability motor car policy of assurance, whereby *P* was indemnified against third party claims for a period ending June 3, 1931, "and during any period for which the Corporation may accept payment for the renewal of this policy". It was a condition of the policy that "no liability shall arise until the premium due has been paid and accepted". No premium was paid for the period subsequent to June 3, 1931, till 11th June, 1931, when *P* paid the premium and a receipt was given stating 11th as the day of receipt but as for policy from June 4th, and issued a certificate of insurance to *P* stating "Date of commencement of insurance, June 4, 1931". The insurance company was prosecuted under S. 112 for issuing a certificate of insurance which to their knowledge was false in a material particular.

Held, that even assuming the statement that the date of commencement was June 4 was false, there must be a finding that it was false to the knowledge of the person issuing the certificate and the conviction therefore must be quashed, and a certificate based upon a mistaken view of the law cannot be said to be false to the knowledge of the insurance company. If anything it is obvious that the Company believed it to be true.

BEST *v.* BUTLER AND FITZGIBBON, (1932) 2 K. B. 108.

Trade Union Act, 1871, *S.* 12—*Officers of a registered Trade Union—Charge of wilfully withholding moneys—Proof of possession at the time of charge, if necessary.*

B and *F*, who were the Secretary and Treasurer respectively of a registered Trade Union, were charged under S. 12 of the

Trade Union Act with wilfully withholding moneys of the Union contrary to that section. It was proved that one or other of them have had the whole of the moneys but as to what exactly each had was not clear and there was no evidence that they were in possession of the moneys at the date of the charge. It was shown that each was aiding and abetting the other in the matter. S. 12 says that "If any officer . . of a Trade Union registered under this Act . . . obtain possession of any moneys . . of such Trade Union, or, having the same in his possession, wilfully withhold or fraudulently misapply the same, . . . or any part thereof, the Court . . may, by summary order, order such officer . . . to deliver up all such moneys . ." The Magistrate dismissed the complaint holding that "a man cannot withhold what he has not got, since the whole case for the prosecution was to show that the money had been squandered. If the section had said, neglect or refuse to deliver, the matter would have been different".

Held, on appeal, that if it is once shown that the person charged has obtained possession of the moneys and has not accounted for it, he is liable to be convicted under S 12. The term "wilfully withhold" indicates a continuing offence. It was not necessary to go further and show that either of them had the money in his possession on the date of the charge.

JOTTINGS AND CUTTINGS.

Forensic Success and Parliamentary Failure.—In his recently published monograph on Erskine, Mr. Lovat Fraser calls attention to the fact that the great advocate, perhaps the greatest ever seen at the English Bar, was in Parliament a complete failure, apparently being for long cowed by Pitt's imperious manner. In this failure in a dual capacity he is by no means unique, for few indeed have been able to attain distinction in equal degree both in the forum and in the House of Commons. The late Lord Bryce, in his sketch of Sir George Jessel, says: "Lawyers in the English Parliament are under the double disadvantage of having had less leisure than most other members to study and follow political questions, and of having contracted a manner and style of speaking not suited to an assembly which, though deliberative, is not deliberate, and which listens with impatience to a technical or forensic method of treating the topics which come before it." Jessel, Lord Bryce adds, had borne little part in politics till he took his seat in the House of Commons, and when he spoke there he obtained no great success. But, indeed, a long list might be compiled of those who, while brilliant in the courts, were little short of failures in the House of Commons Sir Samuel Romilly was an exception. In his case his wide sympathies and his passion for the reform of the old criminal law with all its atrociously

severe penalties won for him an esteem which is seldom meted out to the lawyer member. Coming down to more modern times, Lord Herschell was another exception to the general rule. As a member of the House of Commons he made himself felt from the beginning, the air of quiet conviction about his delivery and the soundness of his matter raising him above the ruck of political lawyers, of whom it has been said that you cannot help hearing the rustle of their silken gowns. In addition to a forensic manner which is not pleasing to the generality of members, it has been said that the lawyer in the House has always been apt to be regarded as a person with an axe to grind, and consequently one not to be looked on with much favour. If there be anything in this criticism, it is only fair to add that lawyers are not unique in this foible.—*L. T.*, 1932, p. 477.

A Wife's Forgery of Cheques.—The circumstances in *Greenwood* v. *Martins Bank, Ltd.* (*Times*, July 6) were of an unusual nature, and are not likely to be repeated, but they raised a question of general importance—the extent to which a bank customer's own conduct in respect of forged cheques will counterbalance the liability of the bank for negligence in not detecting the forgery. The forger in this case was the plaintiff's wife, and when in October, 1929, she told him that his account had been exhausted by a series of these cheques, he refrained at her entreaty from informing the bank. In the following months there was trouble between them over the matter, and in June, 1930, the plaintiff said that he "was going right away to the Bank." When he came home that night she shot herself, and then he claimed from the Bank the amount of the cheques. Mr. Commissioner du Parcq (now du Parcq, J.), at the Manchester Assizes, decided in his favour, but the Court of Appeal reversed his decision (1932, 1 K B. 371; 101 L. J., K B 33), and the House of Lords have approved this reversal. The legal results of the forgery started with the finding of fact that the signatures to the cheques were not merely not genuine, but were honoured through carelessness of the Bank officials, so that *prima facie* the Bank was liable, and, indeed, was liable apart from negligence. But it was argued that the plaintiff had either ratified or "adopted" the cheques; or that by his delay in informing the Bank he was estopped from alleging the forgery.—*L. J.*, 1932, p. 128.

Not a Public School.—That Borstal is not a public school was made manifest by Swift and Humphreys, JJ., in the Court of Criminal Appeal in London last week. There were some amusing exchanges of the "Borstal or Balliol" type between Bench and Bar; but the appeal came to a swift and satisfactory end. The Recorder of Norwich—the city in which a clergyman recently said one or two hard things concerning the City of Belfast—had sentenced two boys to three years' detention in a Borstal institu-

tion. The Court of Criminal Appeal quashed the convictions and the sentences, after Swift, J , had observed: "The Recorder seems to have thought Borstal is a public school . . . ."

"In this case," said he, "the learned Recorder's desire to benefit these two lads has obliterated his legal views of his powers. A Borstal institution is a place to which young criminals are to be sent, and to be sent only when it is shown that they have criminal tendencies or are associates of criminals." He observed that the lads were the children of most respectable people and that Borstal was not a school for children.—*L. J.*, 1932, p. 137.

A Frightful Reforming.—Borstal is better in intention and effect than the frightful and "remedial" methods of olden times, when young people were often imprisoned for long periods, transported, and sometimes suffered the death penalty.

There is a story of Willes, J , son of Chief Justice Willes, a son who was not by any means a great Judge, but who was very well-meaning. At Lancaster Assizes a boy was convicted and the Judge, to "reform by frightening" him, sentenced him to be hanged the next morning. But in the middle of the night the Judge was so affected by his conscience and by a fear that he might himself very well die during the night and the boy be hanged in consequence, that he arose and went to the High Sheriff's house with a written reprieve returned to bed and slept soundly and peacefully till morning. The boy, of course, had a night of terror and foreboding, and there is no record as to whether the effect was truly remedial. Probably not.—*L. J.*, 1932, p 137.

The Extra Thousand of the Irish L. C.—Ireland, before the treaty, had its Lord Chancellor and its Great Seal; and a curious fact was that his salary *qua* Lord Chancellor was greater than the salary of his English counterpart. Lord Ashbourne's salary, for example, was 8,000*l.* a year and he received 1,000*l.* for the purchase of an outfit on entering office. The English L. C. gets 5,000*l.* as Chancellor; the other 5,000*l.* is for his services as Speaker of the House of Lords.

The allowance of 1,000*l.* for the Irish Chancellor's "outfit" was a picturesque survival of the days when, natives of Ireland being ineligible for the office, it was necessary to enable the exiled Englishman to transfer his goods and chattels to the Irish capital. For more than half a centuary no English lawyer held the Irish office, but the payment, its cause removed, continued as before. The salaries paid to officials of the Four Courts in Lord Ashbourne's day amounted to over 80,000*l.* a year. Money was absurdly plentiful in certain places in those days. The Irish Judges, also. were numerous and well paid in comparison with the volume and value of the work performed.—*L. J.*, 1932, p. 137.

Reputation Made in a Night.—Lord Carson and Lord Birkenhead had many points of resemblance; one of them being the fact that, though lawyers, they were both first-class House of Commons men; and the other that each established his fame and position with his maiden speech. Lord Carson, at the age of thirty-nine, made so great an impression that Joseph Chamberlain declared to his son Austen that a new power had arisen in politics; and wrote to Carson congratulating him on "the best debating speech I have heard for a long while in the House of Commons, and for a maiden speech unprecedented."

"He spoke not only with the fluency of a practised orator, but also with all the consummate ease of a Parliamentary hand. Behind him were Mr. Balfour, smoothing his handsome head of hair in the delight of listening; Mr. Goschen, in an angelic rapture; Sir Edward Clarke, looking as if the art of oratory was not dead; and other of the Tory leaders beaming and delighted . . Of the Ministers, Mr. Asquith alone seemed to enjoy the speech It evidently struck sympathetic chords. More than once he nodded his head approvingly. On all sides the opinion is ungrudgingly conceded that a rich acquisition has been made to the debating power of the House, and that the Unionists have added to their Front Bench, an orator of the first rank." Thus the Lobby correspondent of the *Sheffield Telegraph.*—*L. J.*, 1932, p. 137.

Methods of Legal Study.—Is there any royal road to the acquisition of legal knowledge, or, if there is none such, can any one method be described as better than another? In an interesting address on "Culture and Anarchy in Legal Education" delivered by Professor J. D. I Hughes, of the University of Leeds, at the annual meeting, recently held, of the Society of Public Teachers of Law, the abandonment of what was called "the present tradition in students' text-books" was advocated, these to be replaced by books introducing the beginner to the essential framework of law to the exclusion of the subtleties of case law. There is no doubt a good deal to be said for this suggestion in the case of those just entering upon their legal studies, but it is worth remembering that the students' books, as we know them, are a comparatively modern institution. In a note to his "First Book of Jurisprudence," Sir Frederick Pollock, who has done so much to improve the literature of the law, tells us that when he was beginning his studies, his grandfather, Chief Baron Pollock, wrote him as follows: "I myself read no treatises; I referred to them as collecting the authorities. I learned law by reading the reports and attending the courts, and thinking and talking of what I read and heard." Sir Frederick adds that it should be remembered that in the early part of the nineteenth century very few text-books aimed at either systematic arrangement or independent criticism; now, they do both, and the student of to-day is the gainer;

but, after all, he who would make a good lawyer in the sense of one who can advise his clients wisely and can represent them in court well armed legally cap-a-pie must learn his work in the way that Chief Baron Pollock did, namely, by reading the reports, attending the courts, and thinking and talking of what he reads and hears. Good text-books, and there are many such which are listened to with great respect in court, will help to make the path of the student a little easier, but they will not of themselves make him a thoroughly equipped member of the profession. Law, however, may be, and indeed often is, studied by others than those who intend to become practising members of one or other branch of the profession, and Professor Hughes had them also in mind in the address to which reference has been made. He made an eloquent plea for the bridging of the gulf between the traditional academic treatment of law and the requirements of the profession, pointing out that the adoption of the vocational ideal need not lessen the cultural value of a legal education. More than once during the last few years Lord Atkin has stressed the importance of law as a factor in a general liberal education. For this purpose Professor Hughes's plea for text-books introducing the beginner to the essential framework of law to the exclusion of the subtleties of case law, deserves, and, indeed, has already received, attention, as witness, for example, Professor Jenks's admirable "Book of English Law," and the equally valuable "English Law and its Background" by Mr. Fifoot. Such books as these show that English has emerged from the stage of being—to quote the phrase coined by ex-Justice Oliver Wendell Holmes—"a ragbag of details," and has become in the main a well-ordered system grounded upon a recognition of the duty of meeting the ever-varying needs of the community.—*S. J.*, 1932, p. 598.

The Use of Firearms.—When some young men were fined at Welwyn recently for wounding a boy in the ankle with a shot fired from a motor car, they pleaded that they had no intention of hurting anyone, but only wanted to frighten the lad. The incident brings to mind a notable piece of muddled admonition which once fell from a former magistrate of the Westminster Police Court, Mr. Sheil. A man was charged with shooting a gun at his brother. "Had there been any ill-will between you and your brother?" asked the magistrate, and, on being told that there was none, he exclaimed: "A person who points a gun at another without intending to shoot deserves to be well flogged."—*S. J.*, 1932, p. 607.

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FOREIGN NATIONALS AND INTERNATIONAL LAW.*

BY MR. B. SITARAMA RAO.

(*Continued from page* 51.)

Even the jurists of the school of natural or fundamental rights do not exclude the right of each State to take such measures or precautions as it considers needful to prevent the right of access and intercourse being used to its injury nor its power to subject foreign trade and foreigners to regulation in the interests of its own trade or the trade of any other States which it wants to favour—in other words, they justify the tariff policy of the continental States and the exclusion of undesirable aliens. American jurists who stand for colonial ideals have on the one side to insist upon the legal right of the State to exclude aliens and on the other to reconcile their views to the ideals of civilised life which they rely upon for claiming compensation from other States for inefficient administration of justice to, or imperfect protection of life and property of, their nationals. The British jurists are clear that discrimination against foreigners is an unfriendly act for which the States concerned may intervene but somewhat inconsistently speak of the unqualified legal right of the State to exclude foreigners or to subject them to restrictions. The British policy at home as reflected in the British Nationality and Aliens Act is one of equal treatment of foreigners and nationals but the reservation in favour of the

*This is the last of a series of three lectures delivered in pursuance of "The Krishnaswami Aiyar-Sundara Aiyar Lectures Endowment". It owes its existence to the munificence of Sir Alladi Krishnaswami Aiyar who started it in memory of the two great lawyers whose name it bears. According to the conditions of the Endowment, the lectures have to be on a subject connected with public International Law.

Colonies to legislate on the matter and also to accord differential treatment to different classes of British subjects is a concession to the colonial point of view. In practice, the colonials have generally greater power to impose restrictions on Indians than on aliens and similarly Britain has smaller power to intervene on their behalf in the colonies than in foreign countries. It comes out about this way. In the case of aliens treaties so often come in the way of discrimination and even when treaties do not come in, the dread of retaliation from the State of the alien puts a wholesome check on the discriminatory zeal of the colony. None of these considerations applies to the dealings of the Colonies with respect to India, owing to the free hand given by Britain to the dominions to deal with the question. Britain is not hampered similarly in intervening on behalf of India with foreign States. The true rule of international law would seem to be as stated by Hall. He formulates it thus: "For the reason that a State may do what it chooses within its territory so long as its conduct is not actively injurious to other States, it must be granted that in strict law a country may refuse the hospitality of its soil to any or all foreigners, but the exercise of this right is tempered by the facts of modern civilisation. To exclude all would be to withdraw from civilised brotherhood, to exclude without reasonable or at least plausible cause, is regarded so vexatious or oppressive that a State may interfere in favour of its subjects." "If a country decides that a certain class of strangers is dangerous to its tranquillity or are inconvenient to it socially or economically or morally and if it passes general laws forbidding access to persons its conduct affords no ground for complaint. Its fears may be idle. Its legislation may be harsh but its action is legal." In *Attorney-General for Canada* v. *Cain*[1] the following extract from Vattel is cited with approval:—" One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter the State, to annex what conditions it pleases to such entry, to expel or deport from the State at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good government, or to its social and material interests." The case itself arose in connection with the expulsion of an alien. Oppenheim thus states the rule: "Apart from general

1. (1906) A. C. 542.

conventional arrangements, *e.g.*, those concerning navigation on international rivers, and apart from special treaties of commerce, friendship and the like, no State can claim the right for its subjects to enter into, and reside on, the territory of a foreign State. The reception of aliens is a matter of discretion and every State is by reason of its territorial supremacy competent to exclude aliens from the whole or any part of its territory. Every State is and must remain master in its own house and this is of special importance with regard to the admission of aliens. Of course, if a State excluded all subjects of one State only, this would constitute an unfriendly act against which retortion would be admissible but it cannot be denied that a State is competent to do this." "It is obvious if a State need not receive aliens at all, it can receive them only under certain conditions." Hearshey thus states the rule: "True it is that a modern State which excluded all foreigners would practically find itself outside the pale of international community and the exclusion of those of a particular nationality would probably justify measures of retortion in the form of reprisal but there can be no legal right in the premises." He quotes part of the passage above extracted from Oppenheim and cites also Rivier who says "the State is master in its own house. It may refuse to foreigners access to its territory, interdict all immigration or the immigration of certain individuals, for example, nationals of certain countries." This principle, he says, follows logically from the rights of independence and self-preservation but is to-day greatly hampered by the rights of mutual commerce and inoffensive passage. Reference to law and legal right is not quite relevant for the purpose in hand for, as their Lordships of the Privy Council point out in *Musgrove* v. *Chun Teeong Toy*,[1] though "no authority exists for the proposition that an alien has a legal right enforceable by action to enter British territory, circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native". The question there was whether a Chinese immigrant had a right to compel a custom house officer in Victoria to accept the fee of £10 he was required to pay under a section of the Chinese Act of that State of 1881. The section

1. (1891) A. C. 272 at 282.

provided that before any immigrant arriving from ports beyond Victoria shall be permitted to land . . . the master of the vessel shall pay £10 for every such immigrant and no entry shall be deemed to be of any legal effect until such payment shall have been made." It was held to confer no right but merely to impose a condition for entry into the State. To the same effect is the judgment of Justice Gray in the *Nishinivaru case*[1]. He says: "This power (*i.e.*, of exclusion) is vested in the United States of America in the national government to which the Congress has committed the entire control of international relations in peace as well as war. It may be exercised through the political power of the Government either through decrees made by the President and the Senate or through Statutes enacted by the Congress." In exercise of this power the Chinese are totally excluded from the United States and with certain exceptions since 1924 all aliens ineligible for citizenship. Who these are, we have already considered. The class includes all people other than white people and people of African descent, that is to say, it includes the Indians, the Japanese, the Chinese, the Persians and so forth. The anti-foreign legislation dates from 1875. In 1917, an Act of the Congress levied a tax of 8 dollars from every one entering and further required every alien of over 16 years entering the State to have reading knowledge of some language. Among the excluded people are also the following:—"Idiots, imbeciles, feeble-minded persons, epileptics, insane persons, persons of constitutional psychopathic infirmity, people with chronic alcoholism, paupers, professional beggars and vagrants, people suffering from tuberculosis, or subject to a loathsome or dangerous disease, mental and physical defectives of a nature to affect the capacity to earn, polygamists and those that preach or encourage it, those convicted of felony or misdemeanours involving moral turpitude, those who believe or advocate overthrow by force the United States Government or of all forms of law, who disbelieve or are opposed to organised Government, who believe or advocate assassination or unlawful destruction of property, prostitutes and those that come for prostitution or for criminal purposes, contract labourers, paupers and those that are likely to be a

1. 142 U. S. 651.

charge on the public, deported persons, stowaways, children under 16 unaccompanied by a parent, aliens above 16 that cannot write English or some other language or dialect including Hebrew or Yiddish.

This prohibition did not extend to (1) Government Officers, Ministers of Religion, religious teachers, missionaries, lawyers, physicians, chemists, engineers, students, teachers, authors, artists, merchants and travellers from curiosity or pleasure, nor to their wives or children below 16 accompanying them or subsequently applying for admission. The Immigration Act of 1924 made ineligibility to become naturalised a ground of exclusion It attempted to control immigration by a system of consular visas or certificates. It improved the quota system, *i. e.*, the system of regulating the immigration on the basis of the proportion which the men of a particular nationality bore to the total strength of the United States population. This bore heavily on the southern and eastern nations of Europe and less heavily on the people of Northern and Western Europe. This quota system had been introduced under a previous Act of 1921.

The following were, however, non-quota :—

(1) Unmarried children under 18 of a citizen or wife of a citizen residing in the United States.

(2) Immigrants previously lawfully admitted returning from a temporary visit outside.

(3) Immigrants born in Canada, Newfoundland, Mexcio; Cuba, Haiti, Dominican Republic, South American people, their wives and children below 18.

(4) Ministers of Religion or college professors, their wives and minor children.

(5) *Bona fide* students of at least 15 years of age.

On examination it will be found that net is thrown far and wide and the grounds cover (*i*) Physical and moral defects, (*ii*) disease, (*iii*) profession or adoption of immoral or revolutionary doctrines or practices, (*iv*) poverty, (*v*) illiteracy, (*vi*) Asiatic origin, and (*vii*) racial prejudice.

Colonial ingenuity has found some further grounds of exclusion which are utilised for the purpose of masking discrimination. One such is the language test first adopted by

Natal, *i.e.*, writing the application in some European language including Yiddish. In the Colonial Conference of 1897 this test was suggested by Mr. Chamberlain as a preferable method of excluding Asiatics in that it did not involve discrimination nominatim but achieved all the same the desired end of excluding Asiatics. He conceded that the Colonies were entitled to keep themselves free from being overpowered by men of different civilisation, race and customs, but he objected to discrimination by name having regard to "the might, the high culture and traditions of India". This suggestion was adopted in West Australian Act XIII of 1897, New South Wales Act III of 1898, Tasmanian Act LXIX of 1898 and New Zealand Act XXXIII of 1899. A more effective method—the dictation test—was adopted by the Immigration Restriction Act, 1901. As the choice of language was left to the Government, the test in effect was a method of exclusion of any person and at pleasure. The adoption of a non-racial test was a concession to the Japanese and Indian self-respect. Japan could not be ignored by reason of its growing power and importance, and the Indians, being British subjects, forms had to be kept up. This test was employed by Cape Colony in Act XLVII of 1902 and South African Union in Act XXII of 1913. The New Zealand Government improved upon the language test by requiring the applicant to address the petition from his place of abode thus making it impossible for Indians to come to Fiji and there pick up English. Canada has discovered another method. It imposes the condition that any Asiatic immigrant must come from the place of origin on a through ticket purchased in advance and by a continuous journey. As there is no direct passenger steamship connection at present with India, the Indians are by this method successfully kept out of the dominion. The Australian Commonwealth seeks further to mollify Indian and Japanese self-respect by affording facilities for merchants, students and other temporary visitors to have free access to the country. An Act of 1925 of the Commonwealth of Australia clearly enunciates that it is not a question of racial discrimination at all with it but merely a question of securing one cultural type in Australia or of economic or social policy. Accordingly, the Act enables the Governor-General to forbid, either wholly or subject to numerical limitation, the entry of any nationality, race or occupation if he is satisfied that such entry is undesirable by reason of

economic, industrial or other conditions of the Commonwealth or that the persons specified are unsuitable for admission or that they are unlikely soon to be assimilated. This provision has been used against Italians thereby demonstrating the sincerity of the Australian professions that no discrimination is meant against only Asiatic races. The self-respect of the Chinese was not a matter of concern and they were dealt with more directly by imposing poll-tax, by regulating their admission by the tonnage of the vessels in which they came, starting from 1 to 10 tons ending ultimately in 1 to 500 tons, the poll-tax rising from £10 in the Victorian legislation of 1855 to £100 in a New South Wales Act. Notwithstanding the prejudice when there was a shortage of immigrants, Western Australia tried Chinese immigration and under an Act called Imported Labourers Registry Act, started a regular system of indenture. The Australian prejudice against Asiatics did not stop with immigration restrictions on apparent considerations of racial purity and economic competition from persons with a lower standard of life. The Post and Telegraph Act (XII of 1901) forbade the Government to enter into mail contract with ships not manned with white labour—a measure directed against Indian lascars. Mr. Chamberlain refused to accept it on the ground that the discrimination was purely racial and as such against the commitments of Britain by the Queen's proclamation of 1858 in India. As a result, the association of British and Australian Governments in the arrangements for the service ceased. A similar difficulty arose in 1906, when Mr. Deakin proposed preference to British goods provided the goods came by ships manned by white labour. The embarrassing position was providentially avoided as the bill had to be dropped for another reason, *viz.*, its incompatibility with treaties with Austro-Hungary and Russia. Japan has retaliated for the discourtesy shown to her by imposing higher tariff on Australian goods. So far as India is concerned the only action taken is the enactment of Indian Immigration Act (III of 1924) conferring powers on the Indian Government to make rules so that no greater rights and privileges as regards entry and residence are accorded to Colonials than those accorded to the Indians in the Colonies concerned. S. 96 of the Government of India Act is framed on a higher ideal of British citizenship and enacts that no subject of His Majesty resident in India shall by reason only of his

religion, place of birth, descent, colour or any of them be disabled from holding any office under the Crown in India. The Commonwealth of Australia Act in a lower key provides that a subject of the Queen resident in any State shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were the subject of the Queen resident in such other State the equality being thus confined to the Australian Colonial.

New Zealand started by taking action against the Chinese with the tonnage rule and poll-tax in 1881, gradually raised both, introduced the language test in 1907 and finally in 1920 by the Immigration Restriction Amendment Act adopted the principle of permitting the entry of none but British subjects by birth without permits (neither naturalised subjects nor natives of British Colonies, Dominions or Protectorates being included in the term "British subjects") and in the case of all but European British subjects requiring an application in writing from the place of abode.

It is a matter for reflection that a country with a population of 5 millions should be in occupation of an area of 5 million square miles and shut out British subjects on the mere ground that they are Asiatics when they cannot hope to adequately people the country for years to come and when their continuance in possession of the same as against a powerful Asiatic country like Japan is so much dependent on its adhesion to the Empire. This is how it strikes an American writer Mr. Gibbons (*Introduction to World Politics*, p. 516) "Australia with a greater area than the United States has scarcely more than 5 million inhabitants, five-sixths of whom live in the south-eastern tip of the continent and yet the Australian Premier said recently that the continent could support 100 million white people in their accustomed standard of living and in this opinion Lord Northcliffe concurred. New Zealand and South Africa have each scarcely more than a million white population and the possibilities of development are vast and yet these dominions clamouring for immigrants and sorely needing labour exclude Asiatics. This is the greatest problem in world politics to-day. By the most generous calculation of increase, Europe if she directed all her immigration towards these dominions could scarcely fulfil their needs for a hundred years. It is a case, as the Australian

Premier said, of safeguarding the patrimony of our great grandchildren. Will Japan and India wait a hundred years?"

Canada in addition to the rule of continuous journey already referred to also insists upon each person of the Asiatic race possessing 200 dollars in his own right. Japan by reason of Anglo-Japanese treaties of 1906 and 1911, which had been accepted by the Canadian Government without reservation, was in a favourable position and could not be denied free entry. But an understanding was arrived at with Japan in 1908 by which immigrants from that country were restricted to 400 a year and subsequently still further reduced to 150. The Imperial Conferences of 1917 and 1918 pronounced definitely in favour of the principle that Indians lawfully resident should be treated on a suitable basis while fresh immigration should be determined as felt best by the Dominions concerned subject to the rule that temporary visits for business or pleasure or educational purposes should be freely encouraged and regulated by a system of permits and that resident Indians should be permitted to bring in one legitimate wife and children duly certified as such. Canada has not yet carried out the promise; on the other hand has dodged out of it by so manipulating the federal franchise as to make it dependent on the local franchise and the Indians being disentitled to the latter are also disentitled to the former. The Commonwealth of Australia has honoured it by passing an Act giving Commonwealth franchise to Indians resident at least six months. The only humour in a situation so sad is the failure of the early attempts of British Columbia of keeping out Indians and Japanese for one unexpected reason or another. An attempt, for instance, in 1908 proved ineffectual so far as the Japanese were concerned as it contravened the Anglo-Japanese treaty and as regards others it was bad because the provisions of the Act conflicted with Dominion Immigration Law which authorised the landing of every immigrant not rejected by the medical inspector. The latter provision, aimed at preventing improper detention on other grounds, incidentally served to defeat the discriminatory legislation. In *Union Colliery Company of British Columbia* v. *Bryden*[1] prohibition against the employment of the Chinese labourers underground under the Coal Mines Regulation Act was held invalid as it was not a *bona fide* exercise of the power to regu-

1 (1899) A C. 580.

late mines but an attempt to drive the Chinese away by preventing them from making a living—a matter within the jurisdiction of the Dominion Legislature.

In South Africa, Natal which was built up largely by Indian labour was the first country to keep out Indians which it did by Act I of 1897 by imposing a language test. In 1902 Cape Colony passed an Act (No. 47) imposing a dictation test. The Transvaal Parliament by Act XV of 1907 excluded all Asiatics who had not already acquired a legal right to be there. After the advent of the Union things fared no better. Act II of 1913 contained a stringent education clause requiring the immigrant to pass a reading and writing test in a European language including Yiddish and S. 4 of the same Act authorised the minister to exclude any class of persons whom on economic grounds or by reason of standard and habits of life he deemed unsuited to Union conditions and, under the clause, Indians were all promptly excluded, save in very few cases where the Government might waive the provision. The right of entry of one legal wife and minor children under S. 16 of a lawfully domiciled Indian was qualified by the requirement that the marriage must be monogamous. As Muhammadan and Hindu marriages are polygamous in law, though they may in fact be otherwise, these were held to be outside the exemption. This injustice was removed by Act XXII of 1914.

Treatment of foreigners after reception.—" Logically, the principle of exclusive force of the corporate will within a territory, " says Hall, " would lead to the possession of an identical authority over foreigners and members of the State community during such time as the former remain in the country in respect of all acts done by them there, of relations set up between them and other persons, and of duties owed to the State and correlatively to such duties, they would temporarily have the same rights as natural born subjects. Existing law stops short of such assimilation. Until he has made himself a subject of the State, he has neither the privileges nor the responsibility of the subject. His allegiance to his own State is recognised intact and he cannot be obliged to do anything inconsistent with it or to render service to the State into whose control he has come. On the other hand, he has no right to protection or good treatment except to the extent the State can demand." "He is respon-

sible to it for all acts he commits on its territory even though the territory might be in the occupation of the enemy. *De Jager* v. *Attorney-General of Natal*[1]. He is subject to all administrative arrangements made by it which concern the very locality where he is. If in consequence of public calamity, such as outbreak of fire or an infectious disease, regulations are made they can be equally enforced against him. The State has a wider power over aliens that reside more or less permanently than those that are merely travelling and stay temporarily. The former can be made to pay rates and taxes and may even be compelled in case of need to serve in the militia or local police." Hearshey, while conceding that a State may impose all the ordinary taxes on aliens, says that they are not bound to submit to the exaction of forced loans or to taxes which are discriminatory or confiscatory. They must obey all reasonable regulations for their welfare or for the convenience of local authorities, such as vise, passports or registration. The Indian Act (III of 1864) requires a foreigner to take out a licence for travelling.

Jurisdiction of Courts over foreigners.—Most modern States permit the use of their Courts to friendly aliens. Under the English Act aliens are triable in the same manner as subjects. Under the Indian Criminal Procedure Code foreigners are triable in the same manner as Indians but in the case of Americans and Europeans they have the right of European jury if possible. France alone of all countries does not take cognizance of disputes entirely between foreigners. The United States recognises the right of foreigners to resort to the federal Courts. Some countries assert jurisdiction over foreigners for acts committed outside, *e.g.*, Italy, Turkey, China and Mexico. Other States do not assume jurisdiction in those circumstances, *viz.*, England, America, Germany, Spain and France. The majority in the *Lotus* case have expressed however that there is no rule of international law which prohibits a State from exercising jurisdiction over a foreigner in respect of an offence committed outside its territory. (Oppenheim, 282—284.) Lord Finlay thought otherwise. He is supported by Oppenheim, Hall and Hearshey. The Institute of International Law which met at Munich adopted the following article as embodying the right rule on the matter: "Every State has a right to punish acts

1. (1907) A. C. 326.

committed by foreigners outside its territory and violating its penal laws when those acts contain an attack upon its social existence or endanger its security and when they are provided against by the criminal law of the territory where they take place." The League Codification Committee however came to the conclusion that in view of the diversity of practice, international regulation was not practicable on the matter. Some writers who deny the lawfulness of extra-territorial criminal jurisdiction over foreigners generally, nevertheless concede it when, though the perpetrator is corporally abroad, his act takes effect within the territory.

British treatment of foreigners within.—Apart from protection of person and property, every State can treat aliens according to discretion. Thus a State can exclude an alien from certain professions and trades. It can exclude them from holding property. Before the world war, the tendency was to treat the subjects and aliens on more or less the same footing. It is no longer so. Sections 17 and 18 of the British Nationality and Aliens Act relate to the capacity of aliens to hold property. S. 17 declares the right of an alien to take, acquire, hold and dispose of property, real and personal, in the same manner as a natural born subject and similarly provides for title being derived through, from, or in succession to an alien in the same manner as though, from or in succession to a natural born British subject. S. 17 does not, however, confer any right to hold real property outside the United Kingdom or confer any qualification for any office or for any municipal, parliamentary or other franchise or to the ownership of a British ship or to rights or privileges of a British subject except as those provided. Nor do those provisions take away or abridge any power vested or exercisable or government of any British possession or the operation of any law in force or prevent any legislature or Government from treating differently different classes of British subjects. The Aliens Restrictions Act of 1919 imposes further disabilities on aliens, *viz.*, no alien is to hold a pilotage certificate for any pilotage district in the United Kingdom or to act as a Master, Chief Officer or Chief Engineer of a British merchant ship registered in the United Kingdom or as a skipper or second hand of a British fishing boat or to receive an appointment in the Civil Service. An alien can be challenged as a juror on the very ground that he is an alien.

American Legislation respecting foreigners.—Under California Act of 1920 aliens not eligible for citizenship cannot hold any interest in land except such rights as are allowed by any treaty. The same is the case in Arkansas (Acts 209 and 249). In New Jersey and South Dakota, foreign nationals are not permitted to carry on certain professions such as that of physicians; in Michigan, the profession of dentists; in West Virginia and Utas, that of pharmacist; in Michigan, that of certified public accountant; in Colorado, that of shorthand reporters. The law of Arizana requires employers of five hundred or more workmen to employ at least 80 per cent. American citizens. (Foulke, p. 31.) In Grenada, by an ordinance of 1922, aliens and companies under alien control are prevented from holding land or interest in land without a licence from Government. Another ordinance No. 13 of 1922 provides that no alien can carry on missionary solicitation or philanthropic work without permission.

French treatment.—In France every alien should have an identifying card which amounts to a permission to reside and has got to be renewed every two years.

Colonial legislation as to Asiatics: Australia.—The restriction on Asiatics including British subjects in the Colonies beat all these records and constitute a code of international practice which is hardly in harmony with the general practice of States

After an ineffectual attempt in 1876 to levy higher mining and trading taxes from the Chinese, in 1878 Queensland forbade Asiatics or Africans to work on goldfield for three years after proclamation unless they were finders. In 1877 Act 961, Victoria initiated a factory legislation discriminating against the Chinese. In 1886, Western Australia forbade African and Asiatic aliens for 5 years from holding miner's right. By Act XIII of 1904 Queensland imposed disabilities on Asiatics as regards obtaining agricultural advances but rendered it less offensive to Japan by extending it to all aliens by Act XV of 1905. By Act VIII of 1904 and Act IX of 1910, the language test was adopted as a convenient mask to exclude the Asiatic, the absurdity of using it to test the fitness of a person to work in a margarine factory notwithstanding. In 1912-13 Asiatics were prevented from taking part in sugar industry. (Queensland Act IV of 1913, Commonwealth Acts XXV and XXVI of 1912.) Banana Industry Preservation Act (III of 1921) prevents Asiatics

having a share in the banana industry. An attempt was also made to exclude the Japanese from the pearl shelling industry but as the Commission appointed to consider the question reported against the wisdom of the step, the legislation was dropped. The Factories Act of 1904 (No. 22), the Mining Act of 1904, Early Closing Amendment Act of 1904 and finally the Factories and Shops Act of 1920 are the further anti-Asiatic measures of Western Australia. A factory ordinarily requires four or more workers to fall under the regulation but a less number is sufficient if they are Asiatics. No Asiatic can work for longer hours than a woman, that is to say, before 8 A.M. and after 5 P.M. No Asiatic can be registered as owner or occupier unless he carried on the business before 1st November, 1903. All furniture imported or manufactured in the State must be legibly stamped "European labour or Asiatic labour" as the case may be. Chinese laundries were the special objects of attack in some of the Statutes.

South Australia ran the same course in Acts 763, 837 and 890.

In 1910 the northern territory forbade the employment of an aborigine by an Asiatic, not being person born there, ostensibly in the interests of morality.

New South Wales wanted to enact similar legislation against Asiatics but finally restricted it to the Chinese.

In 1907 New Zealand made an effort to penalise Australia in a factory measure but this was given up in order to avoid necessity for reservation. In 1910, an Act regarding factories was in fact but not in form, aimed at Chinese laundries. In 1920, a still more violent measure directed against lascars was taken in hand which proposed to exact on the bills of lading and passenger tickets issued for trade from the dominion to Australia a sur-tax of 25 per cent. unless the vessels complied with the New Zealand conditions of coastal trade. The measure did not, however, become law.

Franchise in Australia.—By Act I of 1905, Queensland deprived all Asiatics of franchise which hitherto they had for the assembly if they held a freehold qualification. Act XXVII of 1907 did the same for Northern Australia. Southern Australia had already done the same the year before. However in 1923 in pursuance of the policy accepted at the Imperial Conference of that year of dealing fairly with the Indian

residents while strictly excluding future entrants Commonwealth franchise was conferred on natives of British India. It remains to be seen how much response the new policy will have in the States and New Zealand.

Pension Benefits, etc.—The Commonwealth excluded Asiatics and Africans from the benefit of the Pensions Legislation, 1908, Invalid and Old Aggressions Act, 1908-25 and Maternity Allowance Act, 1912. The Act of 1908 did not, however, penalise Australian Asiatics and the other Acts were amended so as to extend the benefits to British Indians born in India if resident in Australia. That was in pursuance of the fair dealing promised at the Conference in 1923.

Other Disabilities.—In 1910 a proposal was made to prohibit marriage between Asiatics and Europeans. That was, however, considered too much even for Australia.

Canada.—British Columbia was the first to betray signs of the anti-Asiatic bias. In 1898 it inserted in a number of private Acts, clauses forbidding employment of Chinese and Japanese under a fine of four dollars per head per diem. Its Labour Regulation Act and Tramway Incorporation Act were also directed against the Japanese. The Japanese Government protested and the Imperial Government got the bill disallowed on the ground that nominatim discrimination was improper. In 1899, a Liquor Licenses Act and a Coal Mines Regulation Act similarly motived were also disallowed. In 1900, a Liquor Licenses Act was passed which was directed against the Indians also. It was not disallowed as the provisions were not of great account. Notwithstanding the promise at the Conference of 1917 and 1918 of dealing fairly with the resident Indians, the Franchise Act was so amended in 1920 as to deny the franchise to any person disenfranchised in respect of local assemblies, thus taking away the possibility of Indian voting in British Columbia as that Province has by the Provincial Elections Act of 1897 disenfranchised the Indian, the Chinese and the Japanese alike, and the Privy Council had upheld the legality of the legislation in *Cunningham* v. *Tomey Homma*[1].

South Africa.—Natal which had grown up by the energy of Indians was the first to seek to depress the Indian. By Act XVIII of 1897 a blow was aimed against Indian merchants enacting that they should hold licences if only they could keep

1. (1903) A. C. 151.

accounts in England, a rule extended by interpretation to mean that they must be able to do so personally. Under Act VIII of 1896, they were deprived of franchise on the ground that they had no parliamentary institutions in their homeland. Russians though similarly situated did not fall under the exclusion. In 1905 it was sought to deprive them of the municipal franchise also but assent to it was refused. In 1908 three bills were promoted, one to prohibit further grant of licences to Indian dealers, one to terminate the licences existing after some time and one to take away the franchise. These, however, did not become law. In 1909 an Act was passed giving a right of appeal to the Indians from refusal to grant or renew licences as that was the cause of considerable injustice.

Transvaal.—Here the record is worse. Act III of 1885 refused to allow any Indian to acquire citizenship. It forbade ownership of real property and required Indians to reside in locations. The British Government protested but the Court to which reference was made upheld the legality of the confinement in the locations. The treatment of the Indian was one of the alleged main causes of the Boer War, but the position of the Indians became worse after the war. Lord Milner, as Governor of Transvaal, far from remedying the grievances, proposed to segregate the Indians in separate trade and residental locations with a promised exemption in favour of Indians of education and standing and the strictness of administration of the laws under the new regime as contrasted with the laxity of the old made the position of Indians a good deal less favourable. Sir A. Lawley went further and proposed legislation compelling separate residential and trade locations for Indians unless they were certified to be living in European style. But by that time, the Supreme Court held that the Act of 1885 did not justify location for trading and Lyttleton though prepared to agree to future exclusion of Indians was not prepared to accept this piece of unjust legislation depriving them of their old rights. He said that the apprehended trade competition from a small number of British Indians who, under restriction of immigration, must form a diminishing proportion of the population, could not be accepted as a justification for the legislation proposed. He further added, "His Majesty's Government had steadily declined to allow the fear to influence their views in the past. On the contrary for many years they had

repeatedly protested before the Empire and the civilised world against the policy and the laws of the late South African Republic in relation to this subject. It was contrary to national honour to go back." He agreed to location for residence on sanitary grounds but declined to apply any more severe restrictions to new-comers. The Liberal Government that succeeded, under Lord Elgin and Mr. Churchill, "made no effort," says Sir Borradaile Keith, "to secure the elementary right of Indians before granting responsible Government" though when they were prepared to give that concession, "they had every right to make it conditional on the Boers a decent treatment of Indians as a counterpart to the generosity shown to them". "Of the melancholy pages of British History, few are darker," he adds, "than that of Conservative and Liberal Governments alike in their attitude to the question of Indians in the Transvaal and while the wisdom and the magnanimity of the grant of responsible government to conquered aliens must be recognised, it is deplorable that no room could be found for justice to other British subjects. The responsibility must be shared by the Indian Government, the India Office and the Colonial Office, all animated like the Boers with contemptuous indifference for a race which appeared content to acquiesce in military domination and by the Indian people who in their internecine feuds had allowed themselves to accept the protection of aliens and had not even been roused to self-assertion by the example of the Japanese and the Chinese races without any claim to Indo-European blood." When the new constitution came into force, Lord Elgin tamely agreed to the Asiatic Registration Act. By Act XV of 1907 the Transvaal Government took power to exclude all Asiatics who had no legal right to be there and to deport from the Colony any person believed to be detrimental to the peace, order and good government. The Imperial Government begged that men of rank should not be excluded and that deportation should be confined to persons convicted of crime, that at least they must be allowed a chance to appeal. With that protest or entreaty it allowed the bill to become law. Transvaal Gold Act XXXV of 1908 imposed further disabilities. No right under that law could be acquired by a coloured person and no holder of a right under that law (claim licence or stand licence-holder) might permit any coloured person except his *bona fide* servant to reside

in or occupy ground held under such right. No coloured person is allowed to reside in proclaimed land except in bazaars, locations or mining compounds. Transvaal authorities further showed their indifference to Indian feeling by refusing to allow Muhammadan prisoners to observe their religious fasts and by compelling Hindus to do degrading work entailing loss of caste. They forcibly deported Indians over the Mozambique frontier and the Portuguese by agreement deported them promptly to India. The Orange River Colony had kept Indians out since 1890 and by an Act XII of 1907 allowed admission only to men of standing. There were also minor galling restrictions, such as rules which forbade Indians to use side-walks, to ride in covered cars, or to travel in first class or inside the trams.

The Union promised better things—treatment of Indians being reserved for dominion legislation. The only concession made is permission given for the entry of a wife and children by Act XXII of 1913. The difficulty as to monogamy which was exploited by all the Colonies to oppress the Indian had also been availed of by the South African Government but has been since remedied by an Act XXII of 1914. The rule prohibiting landholding had been evaded by the Indians by resorting to incorporation. This was prevented by Act XXXVII of 1919 but it gave every trader who was carrying on business on 1st May, 1919, right to continue the same. Prohibition of transfer to Asiatics was made to apply to Companies with one or more Asiatics having controlling interest therein. In 1924 General Smuts wanted to pass a Class Areas Bill enforcing segregation of Indians for both trading and residential purposes. In 1925 a Colour Bar Bill was proposed debarring an Asiatic from skilled labour down to the raising of lifts. The Bills were lost. But in 1926 a Mines and Works Act Amendment Bill was passed that in mining areas, certificates of competence in occupation shall be granted only to European and certain other classes known as Cape Malays and so forth. As Mr. Keith observes in his book on "Imperial Unity" unlike the Australian Commonwealth, the aim of the South African Government in these things cannot be "racial purity nor the danger of introduction of natives of an inferior race for the South African negroes are far inferior to the British Indian in all regards and indeed many of the Europeans who oppose their success as

traders so bitterly are really Jews of very low and undesirable class who do not know English and who obtain entry only by their knowledge of Yiddish which for purposes of the Immigration Act is classified as a European language. From the foregoing summary it is amply clear that the exclusion of any class of aliens from the country or from particular industries or *a fortiori* imposition of restrictions in pursuance of a settled economic or social policy of the Government or in accordance with the views entertained about the national type to be developed or out of consideration for the development of home industries or to prevent the swamping of the country or its industries by foreigners, not to speak of considerations of national safety, is quite in accordance with international law and a foreign State cannot complain so long as it is not insulted directly by patently offensive legislation or its nationals are not subjected to inhuman or uncivilised treatment. These conclusions, however disastrous they might have proved to India in the other countries as the previous narration has shown, are not without use for her in the future ordering of her affairs and no reasonable person can object to her insisting upon similar liberty in respect of these matters.

Expulsion of aliens.—The right of expulsion is the complement of the right of exclusion. Though it is true that a State has got power to expel even a friendly alien at pleasure, an expulsion without reason is an unfriendly act especially in the case of persons who have been residing some time or carrying on business. The State of the expelled person is entitled to ask for the reasons of expulsion and failure to supply the reason would be a very unfriendly act. Every expulsion without just cause can be rightly met with retortion. Expulsion is not a punitive measure and should not be performed in an arbitrary or needlessly injurious manner or for an insufficient cause. Unless there is imperative reason or urgency he should be given reasonable time to adjust his affairs more especially in the case of a domiciled alien with business and property interests. There should also be no discrimination because of race or religion. If these rules are violated, indemnity might be demanded by the State—arbitration on failure and finally retortion. (Hearshey.) States possess very much larger powers of expulsion in times of war or grave emergency than in normal times. In England till 1919 the Government had no

power to expel a foreigner except by recourse to Courts under S. 3 of the Aliens Act of 1905 or to Parliament or in times of war in the face of imminent danger or in grave emergency. The grounds of expulsion are enumerated in S. 3 of that Act. Restrictions on Aliens Act of 1914 gave power to His Majesty by order in Council in times of war, grave emergency, etc., to prohibit entry, expel, deport, or confine, or restrict movements of aliens. The Act of 1919 relating to the same matter extended the power for a further period and also gave power to supersede or incorporate the provisions of the Act of 1905. In Switzerland, Art. 70 of the Constitution empowers the Government to expel only such aliens as endanger the internal or external safety of the land. Belgium since 1885 possesses a law enumerating just causes. Many States however do not possess any rules and the power is vested in the Executive. Here, in India, we have the Foreigners Act (III of 1864) which gives power to expel but does not set out the grounds for expulsion. The Institute of International Law at its meeting at Geneva in 1892 drew up a body of 41 Articles concerning the admission and expulsion of aliens and in Art. 28 enumerated nine just causes for expulsion. Many of these like conviction for crimes are recognised grounds but others are doubtful.

An alien cannot be prevented from leaving the country provided he has fulfilled his local obligations and he can take his property with him and he cannot be taxed in respect of the same. There used to be a law known as *Droit de ambaine* now obsolete which entitled a State to confiscate the property of a dying alien. Under the British Finance Act, duties are levied on movables in England of an alien dying abroad though he was not residing at any time in England. The international validity of this rule is questioned.

Extradition.—Fugitive criminals may be extradited on request, but in the absence of treaty there is no obligation to do so. According to Clarke, refusal to surrender is a serious violation of the moral obligation which exists between civilised countries. Fiore calls it "the duty of mutual aid and assistance," Despagnat, "theoretical obligation not positive obligation". Rivier alone holds that there is a positive duty even in the absence of arrangement. At present the matter is governed by Extradition treaties. Except in Great Britain and America, States refuse to extradite their own subjects. It is customary

in England and the United States to require such evidence of guilt according to the laws of the country where the fugitive is found as would justify his commitment for trial. This is not however by reason of any principle of international law. The modern usage is not to extradite for political offences. England, it will be found, has been particularly tender in the course of her history to people running from political prosecutions or religious persecution. These are admitted though they have no apparent means of subsistence. See the Aliens Act of 1905, S. 1. There has been no satisfactory definition of political offences. The Institute of International Law at Geneva has adopted the following rule, viz., that there shall be no extradition in such cases, unless accompanied by crimes of great gravity, such as murder, manslaughter, mutilation, grave injury or robbery, in the case of an insurrection or Civil War unless they are acts of odious barbarism or vandalism forbidden by the laws of war and even then only when the Civil War is at an end that the extradition should take place. In the case of crimes of a composite character, Westlake is of opinion that the State to which the person is extradited should give an undertaking not to try him for a political offence. (1 Westlake, 256-267.) Asylum can be extended to political offenders in warships, legations, consulates or even on merchantmen under certain circumstances. When a person has actually escaped to a foreign country and then taken passage on a foreign merchantman even though it happens to visit home port, the rule protects him. Except in Spanish American States and the Orient no right is at present recognised in consulates and legations to do so. A different practice prevails in the case of warships. This right belongs to the State and no corresponding duty is attached to this right. If the warships or legations harbour ordinary criminals, even then the home State cannot seize them directly but have to make demands through diplomatic channels and, if refused, the hospitality of the port might be denied to the State thereafter.

CRITICAL NOTE

ON

ALIMANE SAHIBA *v.* KOLISETTI SUBBARAYUDU, 63 M. L. J. 303.

The plaintiff in this case has been saved by the accident of the pronote sued on having been marked as an Exhibit before it was discovered that the stamp affixed thereto had not been cancelled as required by S. 12 (1) of the Stamp Act. Can it be the policy of the law—be it Stamp Law—to enrich a defaulting borrower (it is the duty of the maker to affix necessary stamp to the pronote and cancel it) at the expense of the innocent lender, however large the amount involved in the transaction is. The case thus calls for a very close examination from all points of view.

It has been assumed in the case that an instrument sufficient stamp to which has been affixed but which stamp has not been cancelled as required by S. 12 (1) of the Stamp Act is not admissible in evidence under the provisions of S. 35 of the said Act which precludes admissibility in evidence of pronotes *inter alia* which have not been "duly stamped". S. 12 does not, however, enact that an instrument bearing the necessary adhesive stamp but which has not been cancelled as required thereby must be deemed to be one "not duly stamped". What it prescribes is that such an instrument "so far as such stamp is concerned be deemed to be *unstamped*". What does that expression mean? So far as I have seen, its meaning has not been the subject of consideration in any decided case. All the cases referred to in the case under consideration as also those which rely on them and others are either cases in which the instrument was not stamped at all, *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi*[1], *Pothi Reddi* v. *Velayudasivan*[2] or cases in which the instrument was insufficiently stamped, *Krishnaswami Pillai* v. *Rangaswami Chetti*[3], *Dhaneswar Sahu* v. *Ramrup Gir*[4], *Sudhir Chandra Das* v. *Gobinda Chandra Roy*[5], *Chanda Singh* v. *The Amritsar Banking Company*[6], *Nasir Khan* v. *Ram Mohan*[7], *Kunwar Bahadur* v. *Suraj Bakhsh*[8]. We are therefore left to cull the meaning of the

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1. (1913) I.L.R. 38 Mad. 660 : 26 M.L.J. 19. 2. (1886) I.L.R. 10 Mad. 94.
3. (1883) I. L. R. 7 Mad. 112. 4 (1928) I. L. R. 7 Pat. 845.
5. (1917) I. L. R. 45 Cal. 538. 6. (1921) I. L. R. 2 Lah. 330.
7. (1930) I. L. R. 53 All 114 (F. B.).
8. A. I. R. 1932 Oudh 235.

expression on general principles of construction, primarily on the language used. The very expression "deemed" carries with it the idea that the instrument is not intended to be treated as unstamped for all purposes but only for a limited purpose. The expression is further subject to the qualification that it should be "deemed to be unstamped" only "so far as such stamp is concerned". Hence it is clear that it is not intended that the instrument should be altogether void and of no effect but that it should be taken to be good and of effect except that the stamp affixed thereto will be deemed to be not stamped so far as such stamp is concerned. What is the precise limit of the exception is the question. The expression cannot have been intended to mean that an instrument of the kind in question should be treated as one "not duly stamped". Were that the intention, nothing was easier than for the draftsman to have expressed himself in the terms "duly stamped" which have been defined in the Act. It is not easy also to bring such an instrument as one not "duly stamped" within the definition of the term in the Act. It is thus defined:

"'duly stamped,' as applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in British India."

Now the instrument in question bears adhesive stamp of the proper amount; stamp has also been affixed to it and the affixture cannot be said to be not in accordance with the law in force. The omission here lies in failure to cancel it as required by S. 12 (1) which cannot, without unduly straining the language, be said to be "not *used* in accordance with the law in force in British India". This last mentioned expression has obviously reference to the mode of writing on impressed stamps prescribed by Ss. 13 and 14. It may be said that the instrument, notwithstanding that it bears an adhesive stamp, should be taken as not bearing it with reference to S. 12 (2). Definitions are intended to shorten the language employed in the main provisions of Acts and to explain them. But to understand a definition by reference to a provision in the body of an Act will be to reverse the process.

Again S. 33 (2) which directs persons having authority to receive evidence and persons in charge of public offices except police officers, to examine all instruments produced or coming before them for the purpose of impounding instruments not

duly stamped, gives the purpose as "in order to ascertain whether it is stamped with stamp of the value and description required by the law in force in British India when such instrument was executed or first executed". It will be seen that examination to ascertain if adhesive stamp affixed has been duly cancelled is not referred to here. That in itself may not mean much. But there is no provision in the Act indicating the procedure to be adopted by the Collector in the case of such an instrument if it is treated as one not duly stamped. True there is no such provision also in the case of bills of exchange, promissory notes and instruments chargeable with a duty of one anna only or half an anna only and which have not been stamped or insufficiently stamped and which are excepted from the provisions of Ss. 35 and 40 (1). That may serve to cast a doubt as to the correctness of the stricter view held by the Madras High Court and the Courts which adopt that view, *viz.*, that the promisee in cases where the transaction is simultaneous with the execution of the instrument is without any remedy whatever. I shall not further pause here to consider which of the two conflicting views held on the point is correct.

Suffice to say that both the Negotiable Instruments Act and the Indian Stamp Act have been adopted from the corresponding English enactments and when under the English law it is conceded that in spite of the instrument not being properly stamped, it is permissible to a party to recover money lent by him independently of it, there is no reason why a different policy should be conceived in India where commerce is in the cradle and industry still in infancy. If codification here has produced a result which was not in the minds of the framers it is meet that legislature steps in to rectify what it never meant.

I here confine myself to an instrument the stamp affixed to which has not been cancelled. Does the function of the Collector lie in merely considering if the instrument and others excepted from the provisions of Ss. 35 and 40 (1) call for a prosecution or not under the provisions of S. 62 or S. 63. The Act, however, does not expressly say so anywhere.

It should be pointed out also that S. 47 allows a person to whom a bill of exchange, promissory note or cheque chargeable with the duty of one anna is presented for payment *unstamped*, to affix the necessary stamp thereto and cancel it and recover the amount of the stamp from the person liable to it

and such an instrument is deemed valid and good so far as the duty is concerned. Is an instrument bearing the necessary stamp but which stamp has not been cancelled within the purview of this section ? In other words, does the section include the case of instruments falling under S. 12 (2) which though stamped must be *deemed* to be unstamped ? There is no reason why the law should be harder than in the case where it is not altogether stamped. Then why should an instrument of the kind when produced before a Court meet with such a severe treatment to an innocent holder ?

Lastly, but not the least, while S. 62 makes execution, etc., of not *duly* stamped instruments an offence, S. 63 makes failure to cancel as required by S. 12 also an offence. As the punishment provided by the former section is Rs. 500, there is no necessity for the latter section which provides for a fine of Rs. 100 only in case an instrument falling within the latter section is treated by the legislature as one not duly stamped. On the whole, I am led to think that an instrument bearing sufficient stamp but which stamp has not been cancelled is not inadmissible in evidence but that the only penalty in such a case lies in prosecuting the defaulter under S. 63.

KHAN BAHADUR MD. FAZLUDDIN SAHIB,
District and Sessions Judge (Retd.),
Chidambaram.

SUMMARY OF ENGLISH CASES

In re WILLIAM C. LEITCH BROTHERS, LIMITED, (1932) 2 Ch. 71.

Company—Winding up—Companies Act, S. 275—Company carrying on business with intent to defraud creditors—Meaning of —Liability of director—Extent of.

Section 275, sub-sec. (1) of the Companies Act, 1929, provides as follows:—"If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court, on the application of the Official Receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any of the directors, whether past or present, of the company who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limi-

tation of liability, for all or any of the debts or other liabilities of the company as the Court may direct"

If a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intent to defraud. If a director knowing of the position deliberately goes on trading, then under S. 275 of the Companies Act, he becomes liable to an extent which is in the discretion of the Court Under S. 275 there shall be a declaration against the guilty director for a definite amount "S. 275 is in the nature of a punitive provision, and where the Court makes such a declaration in relation to all or any of the debts or other liabilities of the company, it is in the discretion of the Court to make an order without limiting the order to the amount of the debts of those creditors proved to have been defrauded by the acts of the director in question, though no doubt the order would in general be so limited."

ELLIS *v.* NOAKES, (1932) 2 Ch. 98.

Tort—Conversion—Sale of land excluding timber—Timber to be cut and removed before October 11—*Timber cut, but not removed by that date—Sale of timber by vendee of land—If valid.*

L sold his estate to defendants excluding the timber standing thereon, and then sold the timber to the plaintiffs by a conveyance which stated that "the timber was to be cleared as stated in the catalogue particulars and by date therein stated"

The conveyance to *L* excepted from it and reserved to the vendor or his assigns the timber, tellers, saplings, poles, etc., on the land with full right and liberty to the vendor or his heirs and assigns to enter upon the hereditaments at all times up to 11th October, 1927 and to fell and remove all timber from there. The timber was sawn on the ground by September 3rd, but the planks so sawn were not removed by October 11, and when the plaintiff endeavoured to remove them after that date, the defendants refused him facilities and alleged that they became their property and were sold away by them.

Held, that it is not a conditional exception only depending on whether they are removed before October 11. The property in the trees is in the person to whom they were reserved and the time limit does not import a condition into the exception or render the property in the timber one which upon the failure to comply with the time limit, causes a reverter of the property in the timber to the purchaser of the hereditament. On account of this time limit, the right of the vendor or his assigns to enter upon the land after October 11 may be open to doubt but the conveyance does not operate to confer any estate or interest in the timber upon

the purchaser of the land, and the defendants were liable for conversion

Wray, J.'s opinion in (1584) 1 Leonard 275 followed.

ELLIS *v.* JOHN STENNING & SON, (1932) 2 Ch. 81.

Tort—Conversion—Timber excepted from sale of land—Timber sold to another purchaser after date fixed for removal of same from land—Purchaser of timber refusing to return the timber—Liability to—Prior judgment in suit between landowner and timber owner—Unsatisfied—If bar to the present action

A certain estate was sold by *L* to *N* in 1925 and by that conveyance the timber standing on the land was excepted from the conveyance and reserved to the vendor or his heirs or assigns with liberty to enter on the land and cut and remove them by October 11, 1927. The timber was cut and sawn by then (*i.e.*, October 11) but not removed. Thereupon *N* sold the timber to the defendants *L's* assign brought an action for damages for wrongful conversion and obtained judgment [*vide* (1932) 2 Ch. 98] but he took no steps to enforce the judgment and it was unsatisfied. He then wrote a letter to the defendants stating that the sale of the timber to them by *N* was ineffective, as they had no title to the timber, and asking for its return or the payment of its value forthwith

Held, that for the decision of the question, it makes no difference whether the defendants had or had not notice of the plaintiff's claim to the timber when the agreement to purchase it from *N* was entered into. For if in fact the timber was at those dates the property of the plaintiff, any dealing with it so as to deprive him of his property, with or without notice of his right, would constitute as against him a conversion of the timber. The conversion now complained of is not the purchase of timber from *N* but the refusal by the defendants to deliver up the timber, and if the refusal cannot be justified it constitutes a tort quite distinct from that arising out of the sale and purchase agreement and one in which *N* took no part. The prior action is therefore no bar to the maintainability of the present suit.

A judgment in trover whether in the alternative form or is merely a judgment for the value of property or for damages for their conversion does not in any way affect the title to the property of the plaintiff or his right to recover on the judgment so long as it is unsatisfied. A plaintiff in these circumstances may exercise all his rights as owner notwithstanding the judgment. Only he cannot in any case obtain a double satisfaction. Therefore unless actual satisfaction of the judgment is obtained, or the plaintiff does any act sufficient to constitute confirmation by him of the title to the timber in *N*, the defendants cannot retain the timber and were liable to damages.

E B. SAVORY & COMPANY *v.* LLOYDS BANK, LIMITED, (1932) 2 K. B. 122.

Banker—Conversion—Bearer cheques—Agent of drawer stealing them—Payment by agent into a branch bank of defendants—Paying-in-slip in the name of payee stating merely the name of the agent into whose account the cheque was to be paid—Head office having no means of knowing from the paying-in-slip details—Negligence—Bills of Exchange Act, S. 82—Practice at Banks.

A firm of stockbrokers on the London Stock Exchange sued the defendant bank for conversion of a number of cheques stolen by two of the firm's agents *P* and *S* and paid by them into their private accounts. The cheques were as usual crossed bearer cheques, having been drawn in favour of certain jobbers. *P* who had an account at a branch *W* of the defendant bank took the cheque to one of the defendant's city offices, whose officials did not know him or the drawer or the payee, filled up a paying-in-slip in the name of the payees, and requested that the amounts of the cheques should be credited to his account at the *W* branch. *S* also similarly dealt with his cheques, only they had to be paid to his wife's account. It was a practice of the banks to require a paying-in-slip alone giving the customer's name, branch at which he had an account and the amount of the cheque. The paying-in-slip alone was forwarded to the branch, the cheque itself being directly sent to the Clearing House. The result was that there was nothing to put the officials at the branch on notice to enquire as to the nature of the cheque. It was in evidence that this system was in vogue for over 40 years at several banks without any such difficulty and the bank therefore claimed to be protected by S. 82 of the Bills of Exchange Act

Held, that before the Crossed Cheques Act, 1876 and Bills of Exchange Act, 1882, the defendant bank would have been liable inasmuch as they dealt with the cheques in a manner inconsistent with the rights of the plaintiffs, the true owners, and it would then be no defence that they had no reason to believe that they were converting them. Section 82 of the Act of 1882 gave protection, in the case of crossed cheques, if the Bank received payment for a customer "in good faith and without negligence". But reasonable care there is in the interests of the true owner. The bank have not discharged the burden of proving that they dealt with these cheques without negligence. Their branch manager has not made sufficient inquiries in opening the two customer's accounts, and the banks receiving the cheques have not passed on sufficient information to the customer's branches, as they easily could have done. The system of paying-in-slip without fuller information was inherently defective.

Per Lawrence, J.—*P* and *S* were not customers within the true meaning of S. 82. They had no account at the receiving

offices, and although no doubt the respondent bank with its head office and all its branch offices is a single corporation, yet for certain purposes, branch offices are regarded as distinct trading bodies. Customer in the section means "a person having or about to have an account at the collecting bank".

BRITISH THOMSON-HOUSTON COMPANY, LIMITED *v.* FEDERATED EUROPEAN BANK, LIMITED, (1932) 2 K. B. 176.

Company—Articles of Association—Power to directors to delegate their powers to any director—Action of director thereon—Liability of the company.

By the articles of association of the defendant company, the directors had the power "to delegate to any managing director . . or to one or more of their own body . . such of the powers and authorities hereby conferred on the directors . . as they may consider requisite for carrying on the business of the company or any portion thereof . . ." and to "determine who shall be entitled to sign on the company's behalf bills, notes, receipts contracts and documents".

The plaintiffs were supplying goods to *H* Company, who required a guarantee from the defendants, a banking company. *N* was the Chairman of the Board of Directors and he sent a form of guarantee to the plaintiffs executed by the Bank by *N* as chairman. The Bank disavowed liability on the ground that any guarantee by them had to be executed by two directors under the articles.

Held, that as the articles of association give the power to delegate to one of them, persons dealing with the company, though they are deemed to have notice of the extent of the power, are not bound to inquire into the indoor management of the company to see whether the power has been properly and regularly exercised with all the prescribed formalities. If a stranger finds an officer of the company openly exercising an authority which the directors have power to confer upon him, and especially where he is acting in a matter which is normally entrusted to directors, he is relieved from the duty of further inquiry and is entitled to assume that the power has been regularly and duly conferred.

Royal British Bank v. *Turquand*, (1856) 6 E. & B. 327 and *Mahony* v. *East Holyford Mining Co*, (1875) L. R. 7 H. L. 869, referred to.

Houghton & Co. v. *Nothard, Lowe & Wills, Ltd.*, (1927) 1 K.B. 246, on appeal (1928) A. C 1, considered.

Kreditbank Cassel v. *Schenkers, Ltd.*, (1927) 1 K.B. 826, followed.

The reporter. Mr. W. H. Griffith, has added the following note to the report of this case which is verbatim extracted here:—

"The authorities seem to warrant the following propositions:— If in an action against a limited company the plaintiff relies upon an act of an officer of the company, then

(1) If the company has only a limited power to do the act, *e.g.*, a power to borrow up to a certain amount, the plaintiff is affected with notice of the limitation: *Fountaine* v. *Carmarthen Ry. Co.*, (1868) L.R. 5 Eq. 316.

(2) If the articles of association of the company give the officer authority to do the act provided certain directions are observed, and the officer purports to do the act, the plaintiff is entitled to assume that the directions have been followed: *Royal British Bank* v. *Turquand*, (1855) 5 E. & B. 248: (1856) 6 E. & B. 327; In re *Land Credit Co. of Ireland*, (1869) L.R. 4 Ch. 460; *Mahony* v. *East Holyford Mining Co.*, (1875) L.R. 7 H.L 869; *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.*, (1895) 1 Ch. 629.

(3) If the articles merely empower the directors to delegate to an officer authority to do the act, and the officer purports to do the act, then—

(*a*) if the act is one which would ordinarily be beyond the powers of such an officer, the plaintiff cannot assume that the directors have delegated to the officer power to do the act; and if they have not done so, the plaintiff cannot recover: *Premier Industrial Bank* v *Carlton Manufacturing Co.*, (1909) 1 K B. 106 [dissented from in *Dey* v. *Pullinger Engineering Co.*, (1921) 1 K.B. 77; *sed quaere*]; *Houghton & Co.* v. *Nothard, Lowe & Wills, Ltd.*, (1927) 1 K.B. 246; in H.L. on another point (1928) A.C. 1. But

(*b*) if the act is one which is ordinarily within the powers of such an officer, then the company cannot dispute the officer's authority to do the act, whether the directors have or have not actually invested him with authority to do it: *Mahony* v *East Holyford Mining Co*, (1875) L R 7 H.L. 869; *Biggerstaff* v. *Rowatt's Wharf, Ltd*, (1896) 2 Ch. 93, 102, 106; *Dey* v. *Pullinger Engineering Co.*, (1921) 1 K.B. 77; *Kreditbank Cassel* v. *Schenkers, Ltd*, (1927) 1 K.B. 826, and the principal case.

It is submitted that actual knowledge on the part of the plaintiff of the contents of the articles of association is irrelevant except to an issue raised as to his *bona fides*."

CHINA NAVIGATION COMPANY, LIMITED *v.* ATTORNEY-GENERAL, (1932) 2 K.B. 197.

Crown—Liability of Crown to British subjects in foreign countries—Crown if bound to protect them free of cost—British shipping company trading in China—If can insist on military supply to protect the ship, free of cost.

An English shipping company was trading particularly in Chinese and neighbouring waters At all material times those waters were infested by pirates. Some protection in the shape of armed guards carried on the ships was for a time provided by the Crown, but in 1928, the Crown authorities intimated to the shipowners that, as the defence of a ship against piratical attack from within was essentially a matter for the owners themselves to deal with, the shipowners must pay the whole cost of the armed guard so provided. The shipowners claimed that as British subjects they were entitled to be given protection free of cost.

Held, by the Court of Appeal (affirming Rowlatt, J.), that there is no legally enforceable duty on the Crown to afford military protection to British subjects in foreign parts to protect British property there in foreign parts from danger. The remedy, if any, is pressure brought by Parliament on Ministers to take steps either by diplomatic action or otherwise to protect British subjects. The matter is one for the uncontrolled discretion of the King as head of the army, both as to whether he shall afford such protection and the terms on which he should afford it and cannot be questioned in Civil Courts There is no compulsion on the company to make the payment; but if they want the services they must pay for them if the King requires them so to pay.

Duties of the Crown to subjects discussed.

WIRRAL ESTATES, LIMITED *v.* SHAW, (1932) 2 K B. 247.

Landlord and tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, S. 12—Crown as landlord—Sale by Crown to private person—If vendee also entitled to exemption from the Act

From 1915 to 1928, W. H. Estate was in the ownership and possession of the Crown and the defendants became tenants of the above house from the Crown in 1919 at a rent of 7*s*. 6*d*. a week. In 1928 the Crown sold the estate to the plaintiff. On June 1, 1929, the plaintiff determined the tenancy by a notice to quit and a notice of increase of rent to 10*s* 6*d* a week. The defendants accepted these terms. On April 30 they issued a fresh notice to quit and claimed possession. The tenants pleaded the Rent Restriction Acts as defence.

Held, the defendant was entitled to rely on the Acts No doubt the Crown is not subject to or bound by the Rent Restriction Acts by virtue of its prerogative right and so long as the Crown was the landlord, it had the common law rights of lessor and lessee. But the immunity cannot be passed on to successive purchasers who are in quite a different position after the tenancies created by the Crown have run their course or been determined by notice to quit.

Clark v. *Downes,* (1931) 145 L.T. 20, distinguished as a case of an existing tenancy created by the Crown.

MONTAGU STANLEY & COMPANY *v.* J. C. SOLOMON, LIMITED, (1932) 2 K. B. 287.

Principal and Agent—Agreement by defendant to share losses of plaintiff by reason of a customer introduced by defendant—Customer executing assignment deed of his properties—Loss to plaintiff—Mere signing of deed if actual loss.

The plaintiffs were stockbrokers and members of the Stock Exchange, but the defendants were also stockbrokers but not members of the Stock Exchange. By an agreement, contained in a letter written by the defendants to the plaintiffs, it was agreed that in consideration of plaintiffs paying 50 per cent. of any commission received on business introduced by the defendants as agents to the defendants, the defendants shall be liable to the plaintiffs for 50 per cent. of any loss sustained by them in connection with such business. The defendants introduced one *S* to the plaintiffs. He speculated on the Stock Exchange and ran up a debt to the plaintiffs of a very large amount. He also owed to several others. He therefore executed an assignment of all his properties to creditors which deed the plaintiff and defendant also signed. The plaintiffs thereupon claimed from the defendants the loss sustained by them.

Held, that as the deed of assignment provides that, after paying the creditors, the trustees shall "pay the assenting creditors the amounts of their debts but in case of a deficiency rateably in proportion to the amounts of their respective debts", the deed contemplates payment to plaintiffs in full and therefore the claim must be deferred till a loss is actually proved. The execution of the deed is not sufficient proof of loss to entitle them to succeed. It is only an agreement to indemnify against any loss which may occur and not one to answer for the debt of another.

HAMPTON *v* WEST CANNOCK COLLIERY COMPANY, LIMITED, (1932) 2 K. B. 293.

Mine—Coal Mines Regulation Act, 1887, *S.* 13*—Checkweigher—'Interfering with the management of the mine'—Meaning* of.

Coal Mines Regulation Act, 1887, S. 13, sub-sec. (3) states that "a checkweigher shall not be authorised in any way . . . . to interfere with the weighing, or with any of the workmen or with the management of the mine ." Sub-section (4) provides that the owner, agent or manager of the mine may complain to a Court of summary jurisdiction for removal of the checkweigher on the ground that he has interfered with the management of the mine.

A checkweigher at a coal pit also happened to be the secretary of the local branch of the miners' union, of which the men employed at his pit were members. It had been the custom to work a short shift on Saturdays for many years, but the management desired that in future it should be a full shift. The checkweigher tried to persuade the management to revert to short shift but that not being acceded to, he called off his men and walked away with them without working at all that day.

Held, that it amounted to interfering with the management of the mine and the checkweigher was liable to be removed

Per Avory, J.—If what he did did interfere with the management of the mine, it is not necessary that it must be something unlawful, either in the sense that it is in breach of some statute or that it is unlawful according to common law.

Sykes v. *Barraclough,* (1904) 2 K. B. 675 and *Date* v. *Gas Coal Collieries, Ltd.,* (1915) 2 K. B. 454, discussed and distinguished.

SUTTON *v.* DORF, (1932) 2 K. B. 304.

Landlord and Tenant—Rent Restriction Acts—Rent restriction—Statutory tenancy under the Act—Tenancy if "property" so as to pass to trustee in bankruptcy.

A statutory tenancy under the Rent Restriction, etc, Acts is not "property" within the meaning of S. 167 of the Bankruptcy Act, 1914 and does not pass to the trustee in bankruptcy of a statutory tenant. It is a purely personal right.

Parkinson v. *Noel,* (1923) 1 K. B. 117, no longer good law.

FANTON *v.* DENVILLE, (1932) 2 K. B. 309.

Master and Servant—Employer and employee—Accident to employee—Defective plant—Liability of employer—Common employment—Limits of doctrine.

F was engaged as an actor under *D,* a proprietor of a touring dramatic company. *D* did not himself travel with the company, but his representatives, his brother *C* and Stage Manager *S* and *R* the producer were in charge of the arrangements. At a theatre in Gateshead the Company was staging a thrilling melodrama in which there was a scene showing the execution of a murderer by hanging. The proprietor *D* had given instructions not to play this scene but yet it was decided to be staged at the local theatre's desire. *F* was offered a "double" for acting it. There was a rehearsal held for the scene. The local theatre had put together a scaffold with a drop and a mattress on which to drop had been provided by the touring company. *S* and *C* did the drop first safely and then *F* tried but in so doing broke his ankle. In an action for damages against *D* alleging negligence of *D* or his servants, and that it was the duty of *D* to provide fit and safe machinery and a sufficient mattress to make *F's* fall safe,

Held, that *D* did not know that the execution scene was to be performed, and that he had delegated to competent persons the production of plays; that assuming that one of them had negligently provided improper plant for a particular scene, which *D* did not know of, the doctrine of common employment prevents the employee from recovering against his employer. "Even in cases where the negligence relied on by the plaintiff consists of negligence in the supply or maintenance of plant or machinery, the employer is only liable if personal negligence is proved, and if the failure to supply or maintain the plant or machinery in a safe condition is due to the negligence of a manager to whom the duty has been entrusted by the employer, the employer is not responsible unless it can be shown that he failed to use reasonable care to select a competent manager, or that he has in some way been guilty of personal negligence in connection with the instalment or maintenance of the machinery or plant or in permitting the continuance of its use after he became aware of its unsafe condition.

Case-law discussed.

Smith v. *Baker*, (1891) A. C. 325 and *Toronto Power Company* v. *Paskwan*, (1915) A. C. 734, distinguished.

Laubach v. *Co-optimists' Entertainment Syndicate*, (1926) 43 Times L. R. 30, approved.

In the Goods of BOWKER, 1932 P. 93.

Probate—Practice—Omission of directions in will from probate—Power of Court to.

An application was made by an executor to omit from the probate of his testator's will words having no dispositive effect on the ground that the words were "offensive and objectionable and repugnant to the members of the deceased's family, etc."

The Court made an order excluding those words.

The Reporter Mr. R. M. Middleton has added a note citing cases to show that from 1825 onwards the practice has been to allow the omission from probate of non-dispositive words in a will which are of an objectionable character.

JOTTINGS AND CUTTINGS.

Judges and the Reversal of their Decisions.—There has lately come into the present writer's hands an anonymous collection of sketches of a number of the Victorian Judges, published in 1886 —does any one know who was the author?—brightly expressed and containing many an interesting trait of the judicial personages described. Among those sketched is Vice-Chancellor Malins, of whom little is now remembered save that, when an infuriated litigant threw an egg at him, he wittily remarked that the missile must have

been meant " for my brother Bacon ". Of him the author of the book mentioned says that he was " a judge whose personal virtues were judicial vices. So strong was his love of fair dealing and hatred of oppression that he did not look very closely to the means by which he came to decide in favour of those who had aroused his sympathies." Another has said of him that if he dispensed a home-brewed equity of his own, he was at least a good conveyancer, among his pupils while he was still at the bar being the future Lord Chancellor Cairns, and it is said that he never forgave that illustrious man for not making him a Lord Justice. But Cairns probably knew Malins's capacity sufficiently well not to translate him from the position of being overruled to that of overruling others; at all events, Malins never reached the Court of Appeal. And this brings us to the question, how do individual judges relish having their decisions reversed by the superior tribunal? Of Malins we are told that the only point of contact he had with other judges was when he was overruled, and that those occasions, which were many, produced in him an intellectual obstinacy which did not improve matters. Often and often though he suffered reverse, he never missed an opportunity of justifying to his own Bar the correctness of his decisions, and his delight was extreme when, as sometimes happened, a decision of his, after being reversed in the Court of Appeal, was restored in the House of Lords. Judges, after all, are human, and cannot like having their well-thought-out judgments treated with what they deem scant respect in the higher court; and on the other hand, their delight is exuberant when, as also occasionally happens, the higher court takes the same view as they did Some judges have been more unfortunate than others in this matter. Do we not all recall the story, apocryphal no doubt, of the junior members of a former judge's family who danced round the table when "papa had been affirmed in the Court of Appeal." It is said of Jessel that when his attention was called to the fact that the Court of Appeal had overruled one of his decisions, he said: " That is strange; when I sit with them they always agree with me." Even the most distinguished judges have the unpleasant experience of having their views failing to find acceptance, naturally they do not like it, although they are prudent enough to say nothing about it, contenting themselves by wondering how their colleagues could by any process of reasoning have arrived at a conclusion different from theirs. Not all have been as philosophical as Lord Young of the Scots Bench, who, when someone told him that one of his judgments had been approved in the House of Lords, said: "Well, it may be right for all that".—*L.T.*, 1932, p. 172.

Appeals in Vacation.—It is certainly rare that a Lord Justice of Appeal should be asked to sit and hear an application in vacation time; but a case occurred last week where Lord Justice Romer

sat to hear an appeal from the Vacation Judge. The Judicature Act of 1925 is quite clear on the matter. Section (69 1) enacts that in any cause or matter pending before the Court of Appeal, any direction incidental thereto, which does not involve the decision of the appeal, may be given by a single Judge of that Court, and that he may in vacation time make an *interim* order to prevent prejudice to the interests of any parties pending an appeal. Any direction given in this way may be discharged or varied by the full Court when it meets after the vacation. The issue before the Court involved the rights of shareholders in a company which is in liquidation, and though important for the parties concerned, has no general interest to lawyers or the public at large. What is important to notice is the accessibility of the Court of Appeal—or one of its members—in vacation time. The Lord Justice who sits is not bound to come to the Strand, and, in this case, discharged his duties at his home on the South Coast. So the interests of the parties are protected with as little interruption as may be of the well-earned holiday of the members of this high tribunal.—*L.J.*, 1932, p. 152.

The Home Office Letter on the Road Menace.—The observations we made recently on the death toll of the roads were accompanied by the publication in the Press of a circular letter sent by the Home Office to magistrates throughout the country, calling attention to the statistics of killed and injured for 1931—6,499 deaths and over 200,000 persons injured. The former figure shows a slight decrease as compared with 1930; the latter a large increase. Apparently the view of the Home Office is that this menace to public safety can be dealt with by the stricter enforcement of the law. If magistrates will be induced to do their duty, and if coroners and their juries could be prevailed upon to take a serious view of negligence causing death, something would be gained; but not enough. The danger requires more drastic remedies. The Common Law should, as we have already said, be elastic enough to fix liability for manslaughter on the careless motorist. If it is not, there is Lord Buckmaster's Road Traffic Bill, which contains this proposal. But, in fact, the matter cannot be dealt with by deterrent penalties, and it calls for a drastic revision of road traffic as regards drivers' licences and speed, and also noise, and for competent inquiry into cases of death and injury by an authority independent alike of the Home Office and the Ministry of Transport.—*L.J.*, 1932, p. 152.

Judicial Brevity.—An Irish Judge, Chief Baron O'Grady, had a quick method of summing up in the case of a defendant whose previous blameless record was emphasised by the defence. In the case of a prisoner on trial for the theft of stockings, he thus

addressed the jury: "Gentlemen of the jury, here is a most respectable young man, with an excellent character, who has stolen twelve pairs of stockings. You will find accordingly."

And there is the story of the same Judge, in a civil trial of an action for debt, where the defendant pleaded a set-off: "Gentlemen of the jury, this is an action for debt, and the defendant has pleaded as set-off two things: a promissory note with a long time to run, and an old gig with a very short time to run. You may find for the plaintiff."—*L.J.*, 1932, p. 175.

Lord Halsbury and the Long Vacation.—It was in or about the year 1927 that the Long Vacation in England was altered so as to commence on August 1 instead of in the middle of August. Lord Halsbury, as Chancellor, was strongly opposed to any change, and I recently came upon the following observations, written by a barrister now very well known and eminent in his calling, which show some gift of accurate prophesy. It was written in July, 1905, and ran as follows:

"That the date of the Long Vacation will not be changed whilst Lord Halsbury remains in office may be foretold with absolute confidence. When trams run over Westminster Bridge, then, and then only, will lawyers betake them to Margate, Chamounix and Homburg on August 1. The history of the fate of the last resolution of the Bar on the subject is not yet forgotten. A motion in favour of the earlier date having been passed at the annual general meeting of the Bar, Lord Halsbury convened a Council of the Judges to consider the revolutionary project. A majority of the Judges supported the proposals of the Jacobins, and the reactionaries were beaten on a division being taken. But Lord Halsbury was equal to the occasion. Unanimity amongst the Judges was essential, he intimated, before he could deal with so grave a matter. In the absence of complete agreement, it would be more prudent to allow the question to rest. So the Order in Council which the profession as a whole would welcome is still undrafted."—*L.J.*, 1932, p. 175.

Legal Lyrists.—A little collection of poems, bearing the title "Lyrics of Love and Laughter," from the pen of Mr. G. D. Lynch, a member of the Bar, is a reminder that, notwithstanding its reputed dryness, the law has in each generation had its songsters who, as has Mr. Lynch in the collection just mentioned, have shown that even the technicalities of legal nomenclature can be made to lend themselves to humorous treatment in verse. Some of the neatly turned verses by Mr. Lynch are reprinted from ***Punch,*** which, owing perhaps to the fact that a succession of its editors have been members of the Bar, has never omitted to make full play with legal topics. The present editor, Sir Owen Seaman, has

never forgotten his legal training; nor did his predecessors, Sir Frank Burnand and Tom Taylor, forget theirs. With Tom Taylor, Thackeray, who also was a regular contributor to *Punch*, both in prose and verse, shared chambers for a time in the Temple, which both loved so greatly for its own charm and for the many literary associations that cling to it. Even of those, however, who made the practice of the law their main business and the cultivation of the muse only byplay, not a few have succeeded in the art of writing pleasant verse. Arnould, whom all lawyers know as the author of the standard work on marine insurance, possessed the gift of turning out very neat verse; so, too, as all readers of his biography are aware, did Lord Bowen, who was a genius both in law and in literature, his translation of Virgil being a masterpiece of choice rendering. It will thus be seen that the law has reason to be proud of her votaries who have at the same time cultivated letters, and, in particular, poesy.—*L.T.*, 1932, p. 203.

Life of Lord Oxford and Asquith.—The forthcoming biography of Lord Oxford and Asquith is a work that will make a potent appeal not only to those engaged in politics, but to all members of the legal Profession, as it was in the law that the great statesman won his spurs before entering upon his Parliamentary career. It is of interest to recall that in his early days at the Bar he did not disdain the useful but comparatively humble role of lecturer at the Law Society, a post, however, which he did not hold long in view of the ever-increasing pressure of Bar work. It is further of interest to remember that he succeeded R. S. Wright in the chambers in Paper-buildings and took over also from Wright the "devilling" services of the author who made his name as Anthony Hope, but whom we now know as Sir Anthony Hope Hawkins. Of Asquith that genial writer has left it on record that "there has been nothing in my life that I have valued and enjoyed more than working under and with him, as I continued to do not infrequently until he became Home Secretary in August 1892. When he came back to the Bar he remembered me and sent for me again; but by that time I had gone," the lure of letters proving stronger than that of the law. Asquith, it will be remembered, was the first to break through the old convention that a member of the Bar who has held the office of Home Secretary finally severs his connection with the Bar, so far, at least, as practice is concerned. Sir John Simon followed in the footsteps of his old leader in this matter.—*L.T.*, 1932, p. 203.

Municipal Titles.—An interesting memorandum has been issued from the Home Office on the subject of the titles which the heads of certain cities in England and Scotland are entitled by law to bear. The idea would appear to have gained ground that if the civic head of a municipality is entitled to be designated Lord Mayor, or, in

Scotland, Lord Provost, that *ipso facto* justifies him in being addressed as "Right Honourable". This assumption has been declared to be ill-founded, and that in England the only Lord Mayors entitled to the appellation of " Right Honourable " are the civic heads of the City of London and of York, this being their privilege acquired by immemorial usage; in Scotland, the corresponding dignitaries entitled to be called " Right Honourable " being the Lord Provost of Edinburgh and the Lord Provost of Glasgow, and in the case of the latter the privilege has only been conferred by recent grant, as was also a similar privilege conferred on the Lord Mayor of Belfast. This desire to magnify the office of the civic head of a great municipal corporation is not unnatural, for it seems to enhance the dignity of the city whose chief is called Lord Mayor. But most people, so they are constituted, love to assume a title which will distinguish them from the ordinary run of men, a circumstance which has been exemplified in the judicial as well as in the municipal sphere. An amusing story has come down to us of Serjeant Adams, who on his appointment as first paid assistant judge of the Middlesex Sessions gave out from the bench that he had Lord Denman's authority for saying that he *ought to be* addressed as "my Lord," and the practice of so styling the occupant of the equivalent position of Chairman of the London Sessions has continued from that time. On Lord Denman being asked whether he had given such directions as Adams indicated, he said: " Well, the truth is Jack Adams came to me and said that the Bar at the Middlesex Sessions wished to know whether there would be any *impropriety* in their calling him 'my Lord,' and I told him I could see no objection to their styling him what they pleased, so long as they did not call him Jack when he was on the bench, as that might appear disrespectful to a learned Judge." It thus appeared that a qualified permission was interpreted as an express ordinance —*S.J.*, 1932, p. 638.

A Living Order.—It is to be hoped that some way will be found to provide the means for holding this election. The time has long since arrived for it, for, as the textbooks show us, there are now ten vacancies for Irish representative Peers. There are 157 Peers qualified to elect, and although no Irish peerage has been created since Queen Victoria conferred one upon Mr. George Curzon (as he then was), when he was going Viceroy to India in 1898, the power of the Crown to create them has not been abridged. Article 5 of the Free State Constitution asserts the right for the Executive Council in Dublin to advise on the conferment of titles of honour if these are to be conferred " in respect of any services rendered in or in relation to the Irish Free State"; but that limitation does not seem to restrict the Crown's right to create peers of Ireland for other services. As long as the Order is alive there is no reason why the right to be represented in the Parliament at Westminster should be abridged. The Irish Peers, moreover, are representative

of Ireland as a whole. They do not represent either of the political areas into which the arrangements made after the War divided what is, in many respects, one country. The Irish representative Peers, like the Irish football teams, have been proof against the fissiparous tendencies which many old-fashioned people deplore. The football players can, without aid, preserve their own united existence: but apparently it will take an Act of Parliament to save the older and more dignified body.—*L.J.*, 1932, p. 178.

A Public Attraction as a Public Nuisance.—While no one can be sorry that the unseemly spectacle of a beneficed clergyman of the Church of England exhibiting himself or allowing himself to be exhibited in a barrel has been discontinued, there may be two opinions as to the method by which this object has been achieved. The showman who arranged for the exhibition was charged with causing an obstruction to the highway, and the clergyman with aiding and abetting. The police were prepared to call evidence that a large crowd had gathered in the public road, causing a hindrance to free passage and repassage along it. In effect, their case would have followed the well-known authorities as to queues, such as *Barber* v. *Penley,* (1893) 2 Ch. 447, and *Lyons* v. *Gulliver,* (1914) 1 Ch. 631, in the evidence of the crowd and obstruction. In each of these cases injunctions were granted to the plaintiffs on the ground that the concourse of people who assembled interfered with the free passage of customers to their premises and was thus an actionable nuisance as an infringement of their private rights. The cases of *R.* v. *Carlile,* (1834) 6 C. & P. 636, and *R.* v. *Lewis,* (1881) 71 L. T. n. 117, were prosecutions in respect of the public nuisance caused by crowds similarly attracted. In *R.* v. *Carlile* there was argument that the exhibition was offensive—considering that it consisted of the effigy in a shop-window of a Bishop arm-in-arm with the Devil the suggestion was not without substance—but that in *R.* v. *Lewis* was admittedly innocuous, save for the crowds it drew. In a note on a similar case in respect of Gamage's then new premises at the Marble Arch (74 Sol. J. 823), we drew attention to the dissenting judgment of Phillimore, L. J., in *Lyons* v. *Gulliver,* to the effect that every tradesman or entrepreneur was entitled to attract the public to his premises, and should not be penalised if he did so more successfully than his fellows, the regulation of crowds in streets being part of the normal duty of the police force. There appears to be plenty to be said for this view, but it could only be established, if at all, by the House of Lords disapproving of *Lyons* v. *Gulliver* and the other cases.—*S.J.*, 1932, p. 649.

Obstructing the Police by Warning Offenders.—In a short report of a case at the Marylebone Police Court, it appeared that a

costermonger who warned a street bookmaker that a policeman was approaching was fined £5 for obstructing the officer, the bookmaker having, on the signal, escaped into a private house. The question whether the warning of offenders against the law of the approach of a constable is a wilful obstruction of the latter in the course of his duty within the Prevention of Crimes Amendment Act, 1885, has been considered in two cases as to police "traps" for motorists, namely, *Bastable* v. *Little,* (1907) 1 K. B. 59, and *Betts* v. *Stevens,* (1920) 1 K. B. 1. In *Bastable* v. *Little,* the respondent warned the drivers of approaching cars against the trap, which they accordingly all passed at speeds strictly within legal limit. In the absence of evidence that the drivers of the cars when or before being warned were going too fast, however, they were acquitted. Ridley, J., was of opinion that obstruction within the section must be in the nature of physical force or threats, but Alverstone, L C. J., and Darling, J., did not agree with him. In *Betts* v. *Stevens*, the facts were very similar, but, no doubt, in view of the previous case, the police adduced evidence that some of the warned drivers had been travelling at illegal speed, and the Court, consisting of Alverstone, L. C. J., Darling, J., and Bucknill, J., upheld the conviction of the magistrates. In *Bastable* v. *Little,* Darling, J., said: "In my opinion it is quite easy to distinguish the cases where a warning is given with the object of preventing the commission of a crime from the cases in which the crime is being committed, and the warning is given in order that the commission of the crime may be suspended while there is danger of detection" He quoted this passage in his judgment in *Betts* v. *Stevens,* observing that the gist of the offence was the intention. The case at Marylebone no doubt then followed this ruling. The report being very short, it is not clear whether the defendant was in the bookmaker's pay as a "sentinel," or a mere volunteer, but, for the offence charged, the distinction would appear to be immaterial. The warning given was not the kind which, for example, might be volunteered by an elderly gentleman to to youths playing pitch and toss in the streets, that they should desist from an illegal pastime, lest a constable should come, but merely to suspend the commission of the offence until the danger of the law was past. It is not without significance, however, that all three of the above cases concerned obstruction of constables in the enforcement of laws deemed unreasonable by a large section of the public and continually flouted.—*S.J.,* 1932, p. 650.

Monies or Moneys.—We see that Mr. H. Morley Hooper, of Huddersfield, in a letter to the *Observer* of September 25, complains that there is a growing tendency for the plural of the word "money" to be spelt "monies," and that this seems to be especially true in legal and Government circles. He points out that the plural of money is clearly moneys, just as the plural of valley

is valleys. If "monies," why not "vallies"? Of course, he is right, and the form "monies" should not be used, though we agree that this is often done. For Government circles we cannot speak, but in legal documents the two forms of the plural occur, and this is noticed in the *New English Dictionary*—"For the plural, the irregular spelling of monies is still not uncommonly met with, especially in sense 4." Sense 4 refers to legal and semi-legal parlance, or as an archaism. But the law books keep to the correct form: see, for example, K. & E., 12th edn., II, 730; Enc F. & P., 2nd edn., X, 537. *Prideaux* seems to avoid the question by keeping to the singular. And although the Reports show that testators use the form "monies," yet the reporters and the text-book writers turn this into the correct "moneys" in referring to the cases: see *Re Derbyshire,* (1906, 1 Ch. 135; 75 L. J. Ch. 95), "monies owing to me," as stated in the head-note and in *Jarman,* 7th edn. 1270; and *Re Woolley,* (1918, 1 Ch. 33; 87 L. J. Ch. 169) "any other monies," as stated in the new Supplement to *Stroud's Judicial Dictionary,* p. 589. In these books "monies" is quoted as "moneys". So on the actual evidence, as we have hurriedly collected it, testators seem to be chiefly responsible for "monies," but legal writers are uniform in keeping to the correct form. For the other form, the N. E. D. quotes an old dramatist as making a Jew say: "Why, truly, monies is a goot thing." A very just observation, apart from any question of spelling.—*L.J*, 1932, p. 189.

Second Thoughts.—On the principle that second thoughts are sometimes an improvement on their predecessors, a Scottish litigant in the old days who was dissatisfied with the judgment pronounced by the sheriff was entitled, instead of carrying the case on appeal to the Court of Session, to petition the Judge who had decided against him to reconsider his judgment. Originally there appears to have been no limit to the number of times a disappointed suitor could have recourse to this procedure, but in 1709, this having come to be considered an undue licence, the number of reclaiming petitions as they were called was restricted to two, and of this full advantage was taken, for when has a litigant against whom judgment has been given ever been satisfied that the decision was right? On a number of occasions, Sir Walter Scott, as Sheriff of Selkirkshire, was asked to reconsider the judgments he had delivered, and twice at least he became somewhat exasperated, in one instance on account of certain allegations in the reclaiming petition being couched in terms disrespectful to the Court. As to this, Sir Walter, in a note to his interlocutor, said: "If, in future, a passage shall occur in any paper which shall appear derogatory to the Court, he will not only order the paper to be withdrawn, but accompany his censure with a suitable fine." In one case, however, the reclaiming petitioner was successful in inducing Sir Walter

to reverse his decision on a reconsideration of the facts and the law. This old method of seeking redress by a dissatisfied suitor has long been obsolete, but in theory, at least, there was something to be said in its favour inasmuch as it was less expensive than an appeal to the Court of Session; on the other hand, judges, even the best of them, being only human, are naturally disinclined to admit that they have arrived at a wrong conclusion, and so, on the whole, it is the safest course to leave it to an appellate tribunal to correct the mistakes, or what must be deemed to be such, of the subordinate judicatories.—*L.T.*, 1932, p. 235.

Macaulay as Jurist.—While the whole English-speaking world has been paying tribute to the memory of Sir Walter Scott for his achievement in literature, and in these columns something has been written to recall to professional readers the not indistinguished part he played in the law, it is worth recalling, *a propos* the addition to the world's classics, of Sir George Trevelyan's "Life and Letters of Macaulay," with an introduction by Professor G. M. Trevelyan, that the great historian, who saw, like Scott, that any distinct picture of the past must not be confined to a narrative of purely political affairs, but must take account of the everyday life and work of the people, was, again like Scott, a member of the Bar. It is true that he did not continue an active member of the Profession after the first few years when he went the Northern Circuit, and watched the tactics of great advocates like Brougham and Pollock, but he never lost his interest in jurisprudence, his knowledge of which he was to turn to fruitful account when, years later, as legal member on the council in India, he took the leading part in the preparation of the draft penal code, which, after Macaulay had passed away, and with certain amendments, received statutory force. Macaulay's ingenious method of illustrating the meaning of the various sections of the code by concrete examples has had an abiding influence on legal writers.—*L.T.*, 1932, p 236.

Curves of Litigation.—In these days of the popularity of statistics and index numbers it may be of interest to observe the recent curves of litigation, that is, to note what classes of case bulk most largely in the Digests. It has, of course, to be borne in mind that the number of cases reported is only a fraction of those actually decided in the courts, but the reports give an approximate estimate as to the classes of actions which at any particular time are the most common. It is curious to note how the numbers vary at different times. A few years ago, before the multitudinous conundrums set by the Rent Restriction Acts had been solved, the cases under the caption "Landlord and Tenant" were swollen enormously, and the Digests bore indubitable testimony to the frequency with which actions affecting tenancies came before the courts. Now, if we take the latest issue of the Law Reports Digest we

shall see that the whole subject of landlord and tenant is comprised within five columns, and of these not quite a column is required for cases under the much-discussed Acts. Again, appeals under the Workmen's Compensation Acts have shrunk very markedly although there is still a fair number, chiefly on questions of fact As might be expected, the subject of "Revenue" is for the moment predominant in the Digest, no fewer than twenty columns being required to give the headnotes to the cases. With the income-tax at its present abnormally high rate everyone is naturally disposed to examine his assessment with meticulous care and to contest every apparent overcharge, with the result that the Judge taking revenue cases is kept busily employed in solving the problems set by the Income Tax Act and applying its provisions to the complicated facts of individual cases. Another subject which bulks largely and competes with revenue for first place is "Shipping". The large number of shipping cases may not at first seem so easily explicable as the number appearing in the revenue list, but although the kind of case with which practitioners in the commercial court are concerned has declined in sympathy with the decline in shipping, which we all deplore, shipping still goes on and collisions are unfortunately of almost everyday occurrence, echoes of which are heard in the Admiralty Court. Insurance in its various branches has taken an upward trend, more especially in connection with motor cars, which are gaining an unenviable notoriety in these days for the number of accidents they cause. Lastly, the interpretation of wills, which formerly constituted no small part of the work of the Chancery Division, seems to have fallen away-but whether this is due to the more careful draftsmanship of these documents we shall not venture to affirm.—*S J.*, 1932, p. 661.

BOOK REVIEWS.

CONSTITUTIONAL LAW OF ENGLAND, COLONIES, DOMINIONS AND INDIA WITH A CHAPTER ON LOCAL GOVERNMENT OF ENGLAND, FRANCE, GERMANY, SWITZERLAND AND AMERICA, by S. A. Desai, Barrister-at-Law.

The author of this neatly bound volume has very wisely hit upon the idea of a concise, yet comprehensive, survey of the Constitutional Law of England as administered at Home as well as in the Colonies and Dominions. Nothing could be more opportune than a treatise on such subjects as Local Government and Indian Constitution to the Indian reader who is living in times which are experiencing the throes of a new Constitution-making for India. The writer is amply justified in his extraction of information from the Fabian Tracts dealing with the many problems of Local Government. The book contains all the varied topics connected with Constitutional Law under proper heads. The clear exposition

and adequate method of treatment distinguish the book from the rest of such publications. It is a fine handbook for the student and the lawyer.

HANDBOOK OF MAHOMEDAN LAW, by M. D. Manek, B.A., LL.B. First Edition. Price Rs. 2-8-0.

One cannot but view with satisfaction this little book mainly intended to supply the law student with a correct and brief summary of all the principles underlying the law pertaining to Mahomedans. The author has well chosen to make the subject intelligible by a timely survey of the historical background. Case-law has been exhaustively and carefully appended to the relevant matters requiring elucidation and interpretation. On the whole it is a successful attempt and can unfailingly provide the student with a deal of information especially while preparing for examinations.

THE LAW OF PARTNERSHIP, by Mr. N. Rajagopalachariar, B.A., B.L., Advocate, Madras. Price Rs. 7.

It is with pleasure that we received a copy of the Law of Partnership by Mr. N. Rajagopalachariar. The learned author is already known to Indian Lawyers as the author of the Law of Income-tax in India. The plan adopted by the author in this work is similar to the one adopted by him in his other book, *i.e.*,.of treating the subject in the form of chapters and giving the text of the Indian Partnership Act later, with references to the earlier pages given under the sections. In this respect, the treatment of the subject by the author differs from what we have seen in the other books that have been written on the Act. It must be acknowledged that this book is a thoughtful production on the subject and the author has not rested content with giving references to the decisions and the points laid down by them. He has criticised the decisions in the light of principles and even the sections of the Act where the author thinks they are the result of bad drafting have not escaped his searching criticisms. It may be that the reader may not agree with all the criticisms by the author but there is no gainsaying the fact that the work is one which will provoke thought. One noticeable feature in the references to the decisions given by the author is that he gives the particular pages of the reports where the point is dealt with, a method which will considerably lighten the work of the busy practitioner who otherwise will have to wade through a large number of pages. He has also given the special facts of each case in as few words as possible, when giving references to the cases. It is needless to add that the author has brought the case-law up to date and also given the text of the English

Partnership Act, the repealed provisions of the Indian Contract Act dealing with Partnership, the Report of the Expert Select Committee on the Indian Partnership Bill and the notes on the clauses of the Bill and other useful information on allied topics We wish to draw pointed attention to the fact that the index to the work is full and really helpful in finding out where any particular point is dealt with or discussed. We hope that the book will meet with the appreciation which it richly deserves.

THE ELEMENTS OF THE LAW OF PARTNERSHIP FOR STUDENTS, by Mr. N. Rajagopalachariar, B.A., B.L., Advocate, Madras. Price Rs. 2-8-0.

This is an abridged edition of the work which we have reviewed above omitting the discussions and criticisms on the cases and the sections which will be useful to the lawyer but embarrassing to students. The plan adopted is the same as in the bigger book. Only the more important cases are referred to, to bring home the principles to the students. We have no doubt that this book will really be helpful to the students.

THE INDIAN PARTNERSHIP ACT, by S. R. Dongerkery, B.A. (Hons.), LL.B., Attorney-at-Law, High Court, Bombay.

This is a lucid commentary on the Indian Partnership Act. The learned author has in the annotations to the sections clearly drawn attention to the various points dealt with by the sections under appropriate headings and he has made a judicious selection of the cases for illustrating the principles underlying the Law of Partnership and the various sections. We agree with the author in thinking that a judicious selection of cases will be more helpful to the reader than giving entire case-law on the subject which the reader can easily get from the Digests. The appendices give useful information on various allied topics such as Receivers and Injunctions in Partnership Suits, Partnership and Insolvency, Illegal Partnership, Legal proceedings by and against Firms and Partners, the Reports of the Special Committee and Select Committee. The provisions of the English Partnership Act of 1890 and those relating to Partnership in the Indian Contract Act are also given. We have every hope that this book will be found useful for clearly understanding the provisions of the Act.

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AFTER-ACQUIRED PROPERTY.

The phrase "After-acquired property" in the law of insolvency is used technically to denote the property that is acquired by the insolvent, (including therein what devolves on him by inheritance but not property in the order and disposition of the insolvent or that in his reputed ownership) between the date of his adjudication and that of his discharge. With reference to property of this description the law does not appear to be quite settled as to the rights of the insolvent, his creditors, the trustee in bankruptcy, etc. Cases on the subject can be classed into the following groups:—

(*a*) as between the insolvent and the trustee in bankruptcy;

(*b*) as between the trustee in bankruptcy in that first and that in a subsequent bankruptcy where such a thing arises, each representing the creditors under the respective bankruptcy;

(*c*) as between the insolvent and third parties; and

(*d*) as between the trustee in the bankruptcy and third parties.

There is also a distinction made between real and personal estate.

Before examining the above cases in detail it may be stated that the Indian Legislature has, in making the provisions of the insolvency law, followed those of the English law on the matter, with one exception—if at all an exception—which will be referred to later. And the Indian decisions have followed the English decisions in interpreting the statutes even where the latter are based on the technicalities of English conveyancing, not applicable to Indian conditions,—a use of English precedents

that has been deprecated time and again—in the distinction between real and personal estate.

First let us consider the provisions of the various statutes.

(*a*) The law of insolvency relating to the matter applicable to the Presidency towns of India was embodied in the provisions of 11 and 12 Vict., Chap. 21, S. 7, which reads thus:

"The Court is hereby authorised and required to order that all the real and personal estate and effects of such petitioner . . . and all the future estate, right, title and interest and trust of the said petitioner in or to any real or personal estate or effects . . . which such petitioner may purchase or which may revert, descend, be devised and bequeathed or come to him and all debts growing due to him before the Court shall have made its order in the nature of a certificate do vest in the Official Assignee . . . and such order when so made shall by virtue of this Act relate back to and take effect from, the filing of the petition and shall instantly and without conveyance or assignment vest all the real and personal estate and effects and debts as aforesaid in the Official Assignee."

The Act of 1909 now in force re-enacted these provisions in Ss. 17 and 52 though not in exactly the same language.

(*b*) In the mofussil the Act of 1907 was the first *ad hoc* legislation dealing with insolvency. Prior to that, the Code of 1882 provided for the insolvency of judgment-debtors. There, however, no provision appears to exist for the vesting of after-acquired property, unless it be S. 357 which enables the attachment and sale of the property acquired by the insolvent after, what may be called, his personal discharge, for the satisfaction of his scheduled liabilities either till they are satisfied to the extent of a third or till the expiry of 12 years from the date of the order of personal discharge. On the other hand, there is a distinction made between the property vesting in the Receiver under S. 354 and that dealt with under S. 357. The Act III of 1907 however specifically makes provision for the vesting of after-acquired property by S. 16 (4). Act V of 1920, the statute now in force, re-enacts the above provision in S. 28 (4).

(*c*) In England the Act of 1869, not to go earlier, contained the relevant provisions in Ss. 14, 15 (3) and 17. The Act of 1883 re-enacted the above provisions in the same language in Ss. 20 (1), 44 (2) (*i*) and 54 (2). The Act of 1914 is the statute now in force and contains the relevant provisions in S. 47.

Before proceeding further it is desirable to analyse the provisions of the several Acts and compare them, leaving out of account, for the present, the Code of 1882, which really is no comprehensive piece of insolvency legislation.

There are two features to which attention may be invited.

(1) There is no difference in the time or manner of vesting of, what may be called, the existing property, *i. e.*, property belonging to the bankrupt at the commencement of the act of bankruptcy or the date of the petition to which the adjudication relates back as the case may be, under the provisions of the several statutes, and the after-acquired property. A corollary to the above is that there is no distinction made in the several statutes with regard to the rights of the insolvent after the adjudication in respect of either class of property.

(2) There is no difference between real and personal property. The time of vesting is immediately or forthwith on adjudication; and no conveyance is required to pass the property from the insolvent to the trustee in bankruptcy; it is statutorily effected. All kinds of property vest at the same time and in the same manner except those which are exempted which do not vest at all.

(3) In spite of the similarity, if not the identity, in the language in the several provisions of the law above referred to, the decisions under the various Acts have made distinction on both the points above mentioned and have given rise to a conflict, which for England, has been settled by the latest statute of 1914, but for India is yet unsettled.

(4) The underlying principles in the two schools of thought may be stated thus: the one which regards the insolvent, so to say, as civilly dead on adjudication; and the other which regards him as capable of dealing with the property until the trustee intervenes, postponing the vesting of the property until that time. It is to be observed, however, that neither school of thought carries its doctrines to their logical conclusion. The first school recognises the existence of the insolvent, at any rate, for the purpose of acquiring the property, even though for an instant, before it, *i. e.*, the property so acquired, becomes vested in the trustee in bankruptcy by the operation of the statute, while the second school does not consider the ownership of the insolvent ownership in the real sense of that term, pure and simpliciter. His dealings with the property in the interval are protected against the trustee in bankruptcy only so far as the parties dealing with him do so *bona fide* and for value.

(5) Now I shall attempt to trace the conflict in some of the decisions and it will be interesting to study how judicial precedent has been evolved out of a legislative enactment to suit equitable considerations, which do not perhaps fit in with the strict letter of the law.

(6) Reverting to class 1 of the four groups indicated at the beginning, what is the legal relation between the insolvent on adjudication and the trustee in bankruptcy? There are two possible views:

(*a*) the proprietary *persona* of the insolvent falls on the trustee in bankruptcy who steps into the shoes of the insolvent somewhat in the nature of a universal heir. *Official Assignee of Madras* v. *Ramachandra Aiyar*[1].

(*b*) the trustee is an assignee of the insolvent's property.

On the first view the insolvent possesses no contractual capacity whatever and no contractual obligations can be enforced against him. All that he earns—even a disqualified person may acquire a benefit—belongs to the trustee, the insolvent being a mere possession or chattel so to say of the trustee occupying a position analogous to that of a slave under the ancient systems of law. The strict construction of the letter of the statute would seem to assimilate the insolvent to such a position. But such a view is an anachronism at the present day.

On the second and the more humane view, the vesting order passed on adjudication must be deemed, statutorily, without the necessity of any conveyance, to assign all the property of the insolvent, in existence or *in futuro*. There was at one time a doubt whether there can be a conveyance of property not in existence But since the decision in *Holroyd* v. *Marshall*[2], *Tailby* v. *Official Receiver*[3] and *Lind*, In re, *Industrials Finance Syndicate, Ltd.* v. *Lind*[4] it has been settled that there can be such a transfer, and that it cannot be attacked on the ground of being too sweeping and comprehensive. But it is a transaction operating on the conscience of the assignor when the property comes into existence, in order to mature a contractual right which it till then was, into an actual transfer, by virtue not of any fresh act or conveyance but of the original conveyance. Now however a question may arise as between the

1. (1922) I. L. R. 46 Mad. 54: 43 M. L. J. 569.
2. (1862) 10 H. L. C. 191. 3. (1883) 13 A. C. 523 at 543.
4. (1915) 2 Ch. 345.

insolvent and the trustee in bankruptcy whether the former could appropriate sufficient for his maintenance. Obviously he must be entitled to do so. As expressed in some cases it is the unwritten law: the insolvent must live to acquire property—even a slave must be fed. When a person voluntarily conveys all his present and future property the conveyance may be attacked as unenforceable, because it would be impossible for any such person to gain his freedom or to gain a fresh start in life. An answer to this is furnished in this that the conveyance is treated as divisible in so far as it prevents the debtor from maintaining himself. (Ghose on Mortgages, pp. 186, etc.) Similarly in the case of the statutory conveyance under the bankruptcy acts operating to immediately vest future property in the trustee, the objection that the bankrupt cannot then make valid payments to his butcher or baker, raised by James, L. J., in Ex parte *Dewhurst*, In re *Vanlohe*[1], does not appear to be a serious one.

(7) Now to the second of the group of cases mentioned above.

Now the trustee in bankruptcy represents the insolvent and the creditors, but so far as the acquisition of property is concerned it is the former aspect that is to be stressed. As between the respective trustees in successive bankruptcies each is the representative of the bankrupt, and when the title has passed to the first it would seem that the second has none. Each acquires title by the same mode and that in favour of the first is earlier in point of date and so his must prevail. And this was the decision of the Court of Appeal in In re *Clark*, Ex parte *Beardmore*[2]. But, in the Divisional Court from which the appeal was taken, decision was given in favour of the second trustee on considerations based upon some supposed equity in favour of those who became creditors in the interval between the two bankruptcies and who may be supposed to have in some way contributed to the acquisition of property. The view was pressed that the subsequent creditors were really paying the prior creditors; but that is inevitable in any bankruptcy where the person who supplied the goods to the bankrupt on credit has to share rateably with other creditors the price of those goods. The view is based on the exception to the *eo instanti* theory of the property vesting introduced or rather formulated

1. (1871) L. R. 7 Ch. App. 185. 2. (1894) 2 Q. B. 393.

by *Cohen* v. *Mitchell*[1]. This exception was held by the Court of Appeal not applicable to this case. It would be useful to consider the rule in *Cohen* v. *Mitchell*[1] and again to recur to this case.

(8) The rule in *Cohen* v. *Mitchell*[1] referred to above takes us to the fourth of the class of cases referred to at the beginning. The oft-quoted and celebrated rule is this :

" Until the trustee intervenes all transactions by the bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value in respect of his after-acquired property whether with or without knowledge of the bankruptcy are valid against the trustee."

This proposition was drawn by Lopes, L. J., concurred in by all the three Lords Justices and laid down by the Master of the Rolls (Lord Esher, Fry and Lopes, L. JJ.). This proposition was admitted by the Judges themselves to be wide in terms; but the principle of it was said to be involved in the earlier decisions. Later learned Judges did not seem to take quite the same view and placed restrictions upon the proposition until it was adopted in its entirety by the legislature in 1914.

(9) Let us however briefly examine the earlier decisions which are said to involve the principle embodied in the generalised rule.

There is a class of cases where the process of the acquisition of the property itself involves the alienation so that the after-acquired property cannot be said to be legitimately free from it. *Kerakoose* v. *Brooks*[2] may be taken as the type of this class. In this case an undischarged insolvent borrowed a sum of money for purchasing the stock-in-trade and goodwill, etc., of the Imperial Hotel at Madras and executed a bond and also an agreement that he would execute a security over the goods to be purchased for the repayment of the loan and he did execute the security bond. Here the purchase, the agreement to execute the security and the execution of the security bond were regarded as a single transaction and the after-acquired property was the Imperial Hotel subject to the security. Hence the security was held to prevail against the Official Assignee. This class of cases therefore does not need the doctrine of the postponement of vesting in order to support the alienation.

1. (1890) 25 Q B. D. 262. 2. (1860) 8 M. I. A. 339.

(2) There is a class of cases where the Official Assignee is estopped from asserting his right. The principle of these cases depends on the ordinary doctrine of estoppel, nothing peculiar to the Bankruptcy law. Difficulties may no doubt arise as to whether certain circumstances constitute such an estoppel.

(3) There is a class of cases where the bankrupt has been allowed to sue for the recovery of the property against a trespasser.

The bankrupt can, in this case, be regarded to be acting only for the Official Assignee and acquiring property for him and as is usual in such cases notice is given to the Official Assignee who is impleaded as a party and in whose favour a decree is passed. *Sriramulu Naidu* v. *Andalammal*[1] and *Ramanatha Aiyar* v. *Nagendra Aiyar*[2].

The maintainability of such a suit by the insolvent is rested on a special kind of property said to exist in the insolvent in respect of after-acquired property. (*Sriramulu Naidu* v. *Andalammal*[1]—a suit by an insolvent co-sharer against others for his share; *Ramanatha Aiyar* v. *Nagendra Aiyar*[2]—a suit for dissolution of partnership that came into existence after adjudication.) It is such special property which enables the insolvent to use the property till the trustee intervenes, *e.g.*, to collect rent as recognised in In re *New Land Development Association and Gray*[3] which held that *Cohen* v. *Mitchell*[4] rule did not apply to real estates. That there is some such property in the bankrupt which is even transmissible to his heirs is indicated by the decision in *Fatimabibi* v. *Fatimabibi*[5]. It vests in the trustee in a second bankruptcy to enable him to institute such a suit. *Morgan* v. *Knight*[6].

But the property is not such that it represents the entire interest in it, *e.g.*, a decree in a mortgage suit impleading only the insolvent mortgagor in the absence of the Official Assignee will not be effective to dispose of the mortgagor's interest. *Kala Chand Banerjee* v. *Jagannath Marwari*[7] reversing *Jagannath Marwari* v. *Kalachand Banerjee*[8].

1. (1906) I. L. R. 30 Mad. 145: 17 M. L. J. 14.
2. (1923) 45 M. L. J. 827.
3. (1892) 2 Ch 138.
4. (1890) 25 Q. B. D. 262.
5. (1892) I. L. R. 16 Bom. 452.
6. (1864) 15 C. B. (N. S.) 669.
7. (1927) L. R. 54 I. A. 190: I. L. R. 54 Cal 595: 52 M. L J. 734 (P.C.).
8. A. I. R. 1925 Cal. 785.

(4) Then there comes the class of cases where a third party has dealt with the insolvent with reference to after-acquired property and the trustee in bankruptcy later on impeaches the dealing.

It is here that equitable considerations have been invoked in favour of the third parties and the stringency of the statutory provisions divesting all rights from the insolvent has been relaxed and the reasoning employed to wriggle out of the strict terms of the section has not been always logical.

In In re *Clark; Ex parte Beardmore*[1] Vaughan Williams, L. J., in the Divisional Court, observed:

"According to strict construction the property immediately vests; but notwithstanding the words of the section it seems to me that in the very nature of things, which not even an Act of Parliament can alter, property which comes into existence during a bankruptcy cannot vest in the trustee without his doing something to assert his title thereto"

To resort to the very nature of things in the interpretation of a statute appears to be treading on forbidden ground. Is not a vested interest to take effect at a future time known to law? The title fastens on the property as soon as it comes into existence. Why is an act of assertion, apart from the vesting under the statute, necessary to confer the title? There can be a present conveyance of future property. And the learned Judge concludes that (1) the property will not vest in the trustee until he intervenes; (2) that in the meanwhile it will vest in the bankrupt (apparently that property in the insolvent being in its content co-extensive with that of the trustee in bankruptcy when he intervenes throughout the period that it so exists). These conclusions directly contradict the terms of the section. In the same case and in the same Court the other learned Judge, Wright, J., said: "In theory property acquired by the trading of an undischarged bankrupt is acquired for the benefit of his estate in the bankruptcy; but it has long been established that in practice the presumption is the other way until the trustee in the bankruptcy intervenes."

The above statement of the law is far too wide and goes far beyond what is necessary for the protection of an innocent third party. It would embrace a volunteer from the insolvent. There has been no single case where the title derived from the

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1. (1894) 2 Q. B. 393.

bankrupt for no consideration has been upheld against that of the trustee. The contrary has been assumed and certainly there is no equity in favour of a volunteer. Therefore we may take it that one essential requisite for resisting the title of the trustee is the passing of consideration. Must it also be valuable consideration? It would seem yes.

One type of cases under this class is where the bankrupt has parted with his money (it is assumed in all further discussion that the purchaser—including in this term all persons who derivatively hold from the insolvent—has paid value) and later the trustee tries to follow the money. The trustee's right is negatived. Dealing with the uncertificated bankrupt, says Sir W. M. James, L. J., in Ex parte *Dewhurst*, In re *Vanlohe*[1]:

> "These have been going on for centuries, and this is the first attempt to follow into the hands of the person receiving the money which has been paid away for value by an uncertificated bankrupt"

and summarily rejects the attempt. The reason is, it is said, in some of the cases that the money has been consumed and money is by its nature and object intended and used for such consumption and is therefore not available. The reason is not quite convincing; for why should it not equally be applicable in the case of volunteers?

This reason however has been extended to goods, choses in action and personalty. Justification seems to be declining as the extension is made from one thing to another. That these are rather ephemeral as compared with realty and that more formal methods are prescribed by law for the conveyance of the latter from one person to another does not appear to furnish a sound basis for distinction.

Another class of cases is where the bankrupt has traded with the knowledge and consent of the trustee and in the course of the trade has dealt with the goods. The title of the alienee in these cases can be rested on the ground of estoppel or implied agency—the bankrupt having been held out by the trustee as his agent to carry on the trade. The question arises whether apart from any representation of the trustee which has led the alienee to deal with the insolvent as if he were the owner and which will attract the doctrine of estoppel the mere fact of the trustee's knowledge of the trade by the insolvent

1. (1871) 7 Ch. App. 185.

and his failure to intervene will enable the alienee to resist the claim of the trustee.

The wide language, in which this class of exceptions to the statutory rule has been stated, favours the alienee. One ground, as has been suggested already, is that goods are, if one may say so, consumable. Another is that the bankrupt is the agent of the trustee in so far as dealings with third parties are concerned; at any rate where the trustee has knowledge of the trade that the bankrupt is carrying on and where the goods are dealt with within the scope of the agency, the principal, the trustee, will be bound. The same reason must be available to uphold transactions affecting real property forming part of and had, in the course of, a business. For instance, if there was a business of buying and selling immoveable property, such property sold in the course of that business would be beyond the reach of the trustee. The essential qualification no doubt is that it must be in the course of the business. This carrying on of a business may be conceived of as an avocation in which the bankrupt is engaged in acquiring property and if in the course of that avocation and for the carrying of it, he parts with property that must be deemed to be covered in the general process of acquisition. (Per Kay, L. J., in In re *New Land Development Association and Gray*[1], "When business is carried on and personal property dealt with, such dealing consumes it, the consumption goes on as a consequence of the carrying on of the business.") Considered in this aspect the necessity for the trustee's knowledge and consent in respect of the bankrupt's trade does not seem to be quite apparent. Hence, in some later cases, this element is not regarded as essential; but, at the same time, they swept away the other requisite that the transaction must be in the course of a business, and protected any dealing for value. The analogy of a prior mortgagee standing by and suffering a subsequent mortgage to be made without giving notice of his security and thereby being postponed to the later mortgage has been suggested in *Tucker* v. *Hanuman* in order to resist the claim of the trustee. For the above reasoning it is immaterial whether the third party knew of the bankruptcy or even of the fact whether the bankrupt was undischarged.

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1. (1892) 2 Ch. 138.

On grounds similar to those stated above in the case of goods, dealings with choses in action have been protected.

To recapitulate briefly, leaving aside the question of estoppel, the following exceptions, if really they are such, were recognised to the rule of immediate vesting of the property in the trustee under the statute :

(1) the insolvent was allowed a right of suit in respect of the property, though the trustee would be made a party and the decree passed in his favour ;

(2) the liens and obligations to which the property may be subject at the time of the acquisition will be valid against the trustee ;

(3) where the insolvent carries on a trade with the knowledge and consent of the trustee, his dealings in respect of the personal property in the course of the trade with third parties for value were protected.

At this stage came the epoch-making decision in *Cohen* v. *Mitchell*[1]. By a bold stroke it gave an extensive application to what was supposed to be the principle underlying the above exceptions; and enunciated the rule in the general terms already set out above. It will be convenient to reproduce it here. It runs thus:

"Until the trustee intervenes, all transactions of the bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value in respect of after-acquired property whether with or without knowledge of the bankruptcy are valid against the trustee"

Lopes, L.J., who framed the rule regarded it as a development of the principle contained in *Herbert* v. *Sayer*[2] and Ex parte *Dewhurst*[3] We shall presently refer to these cases and see how far the rule is logically deducible from the principle of these cases. Before doing so we shall examine the case *Cohen* v. *Mitchell*[1] itself.

In this case Arthur Cohen became bankrupt and then he traded in buying and selling agricultural machines. To enable him to do so Hyam Cohen advanced moneys at various times. One Foale seized some of the machines and Arthur Cohen brought an action against him for conversion. As he had no money to continue the action he assigned the cause of action to Hyam Cohen for moneys advanced and sums necessary to carry

1. (1890) 25 Q. B. D. 262. 2. (1844) 5 Q. B. 965.
3 (1871) 7 Ch App. 185.

on the action. It resulted in a verdict for £120. The trustee in bankruptcy claimed the money before it was paid out. Hyam Cohen claimed under the assignment. Foalc interpleaded and paid the money into Court. The argument for the trustee was that the cause of action was property acquired by the bankrupt and which therefore vested in him; Hyam Cohen took it with knowledge of the bankruptcy; and as he had intervened before the money was paid out he was entitled to it. For Hyam Cohen it was contended on the other hand that this was a transaction of sale entered into with the bankrupt in the course of the trade and so binding on the trustee. And further that under the earlier decisions transaction for value with an uncertificated bankrupt are protected whether the third party has or has not knowledge of the bankruptcy, the crucial point of time being when the trustee intervenes. The Court of Appeal enunciated the general rule stated above. The reason appears to be that the earlier cases have recognised a distinction between the modes of vesting of property existent and after-acquired property, *e.g.*, considering the bankrupt as agent of the bankrupt; and that it will conduce to convenience to conceive of the bankrupt having proprietary rights in after-acquired estate until the trustee intervenes. But from the facts as stated above it is possible to regard the assignment as an essential condition of the trade carried on and the property acquired as subject to the assignment to Hyam Cohen somewhat analogous to *Kerakoose* v. *Brooks*[1] discussed above. Then it is the after-acquired property subject to the assignment that vests in the trustee.

Now to return to the cases said to form the basis of the rule framed by Lopes, L. J., *Herbert* v. *Sayer*[2] is a case where the bankrupt was allowed to sue on a bill as its indorsee. The Chief Justice of the Common Pleas said:

"The trustee can when he pleases disaffirm the bankrupt's acts; but until he does so the bankrupt's acts are all valid."

If we regard the bankrupt as an agent acting and acquiring property for the trustee's benefit as suggested by the learned Chief Justice, the right of the trustee to disaffirm the acts of the bankrupt is not confined merely to cases outside the scope of the agency, as in the ordinary case of principal and agent, but to whatever acts he may choose. In case he disaffirms is he bound to restore the benefit that the bankrupt may have derived?

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1. (1860) 8 M. I. A. 339.   2. (1844) 5 Q. B. 965.

Yes, it would seem, if it formed part of the property seized by the trustee, for then it must revert back to the agent who would be an implied trustee for the third party. Here it is that the two constructions of the statutory provisions referred to, and the preference shown to one of them, by the Chief Justice of the Common Pleas are of aid. If however the benefit received by the insolvent did not reach the trustee's hands but had been consumed by him, the trustee, it would appear, would not be liable to indemnify the third party for the loss of the benefit. Says the Chief Justice:

> " In this case, the effect of the statutory enactments may be either to transfer immediately such property or contracts from the bankrupt to the assignee vesting the property in the bankrupt for an instant only or to give the assignee the beneficial interest and to make the bankrupt acquire property or contract for his benefit only in the natuie of an agent. The cases accord with the latter construction of the statute and it is most consistent with convenience ; for otherwise there would be no protection for persons dealing with an uncertificated bankrupt. Not only would they acquire no title by purchases from him, but payments for such purchases and for all debts due to the uncertificated bankrupt would be invalidated. The legislature by several statutes have protected all such payments by and to, and all dealings and transactions with the bankrupt *bona fide* made or entered into without notice of the bankruptcy before the fiat; but there is no such provision by the statute law to such payments, dealings and transactions after the fiat ; and the only way by which they can be rendered valid and great confusion, inconvenience, and hardship prevented is by adopting the latter construction and holding that the bankrupt acquires the property and the contracts for the assignees, who may whenever they please disaffirm his acts, but until they do so his acts are valid."

I have quoted the passage at length so that one may be able to consider its implications and see how far *Cohen* v. *Mitchell*[1] develops the principle contained therein.

The above passage may be reduced into the form of three propositions as follows :—

1. Title vests in the trustee at the moment of the acquisition; but it is the beneficial title;

2. The bankrupt's acts have to be regarded in the nature of the acts of an agent for his principal for the latter's benefit;

3. The trustee may whenever he pleases disaffirm the acts of the bankrupt and until he disaffirms the acts are valid;

and as a reason for the construction of the statute which would yield the above results in preference to the one which would treat the bankrupt as a mere trespasser, protection must be given to third parties dealing with the bankrupt after bank-

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1. (1890) 25 Q B D 262.

ruptcy, as similar protection is given to them in respect of transactions between the date of the presentation of the petition or the act of bankruptcy as the case may be and the date of the adjudication.

Compare the above with the rule in *Cohen* v. *Mitchell*[1] which also can be stated in the form of a number of propositions thus:

1. Title does not vest in the trustee until he intervenes;

2. Until such intervention the acts of a bankrupt are those of an owner exactly similar to those before the bankruptcy;

3. The trustee cannot disaffirm retrospectively. This can have a meaning only where another *bona fide* purchaser for value had derived title from the trustee's alienee. The very expression "disaffirm" implies a prior completed act. The rule in question says that an act when once it is complete cannot be impeached by the trustee.

As regards the reason, the actual protection given by the rule in *Herbert* v. *Sayer*[2] does not go as far as that given in cases of dealings before the date of adjudication while that given by the rule in *Cohen* v. *Mitchell*[1] is wider in that it embraces also cases where the third party had knowledge of the bankruptcy, and even, of the absence of an order of discharge.

The other case on which the rule in *Cohen* v. *Mitchell*[1] is based is Ex parte *Dewhurst*, In re *Vanlohe*[3]. The judgment in this case is a short one and lays down no general principles. The bankrupt had taken a lease and paid the rent in advance and the trustee sued for the rent paid. It was held that he could not recover Presumably the trustee repudiated the lease; for otherwise clearly he cannot approbate and reprobate. Assuming he repudiated the lease and the surrender of the lease was valueless, can he sue for the money as having once belonged to the bankrupt's estate? This decision says that he cannot. Logically it would seem that he would be able to sue, unless on the ground that money is in its nature consumable and had been consumed. The decision itself would seem to rest on the fact that it was money that was the subject-matter of the litigation; at any rate no wider principle is stated. It may also be worthy of note that in decisions later than *Cohen*

1. (1890) 25 Q. B. D. 262. 2. (1844) 5 Q. B. 965.
3. (1871) 7 Ch. App 185.

v. *Mitchell*[1] it was stated that the extension of the rule to realty was not warranted by the earlier decisions.

Thus it would seem that the rule in *Cohen* v. *Mitchell*[1]—that the property does not vest in the trustee until he intervenes—is not warranted by the earlier decisions in all its implications and in its entirety. But when once it is accepted, there seems no reason, in principle, in view of the clear language in which the rule is couched, to limit its application to personalty. Curiously enough when two years later, the rule in question came up for consideration in In re *New Land Development Association and Gray*[2], Chitty, J., was emphatically of opinion that though the language is wide, the Judges in *Cohen* v. *Mitchell*[1] never had in mind real estates. One is familiar with the process of restricting the operation of a rule stated in a case and couched in wide language with reference to the particular facts of the case; but can you so explain away the very basis of a decision, unless thereby say euphemistically—as is sometimes done—that the decision referred to is not sound law. But the very same Judge in a still later case in In re *Clayton and Barclay's Contract*[3], would not extend the limitation of the rule to a chattel interest in land, although he admitted, that some at least (the counsel contended all) of the reasons that induced him to make an exception in favour of real estates, were equally applicable to leasehold interest. Indeed it would appear that Chitty, J., was of opinion that his decision in the previous case was wrong and would have wished that it had not been confirmed in appeal and created a binding precedent on him, and he had been left quite free again to apply the rule whose language was wide enough to include all property as he stated in this case. As Neville, J., put it in *Official Receiver* v. *Cooke*[4] one cannot understand why the language of the statement in *Cohen* v. *Mitchell*[1] should be interpreted differently in the case of real and personal property and is not satisfied with the reason of Chitty, J., in In re *New Land Development Association and Gray*[2] for the distinction and having established the distinction cannot understand how he held in In re *Clayton and Barclay's Contract*[3] that leaseholds came within the rule. It will be curious to notice that Neville, J., does establish the distinction for which he says in the above passage there is no

1. (1890) 25 Q. B. D. 262.
2. (1892) 2 Ch. 138.
3. (1895) 2 Ch. 212.
4. (1906) 2 Ch. 661.

warrant and excludes the equitable real estate from the operation of the rule in *Cohen* v. *Mitchell*[1]. It is worthy of note however that Neville, J., is not satisfied with the state of the law.

This distinction between realty and personalty for which there is no warrant even in England according to Neville, J., was adopted in India where the peculiarities of the English Law as to personalty and realty need not and perhaps should not be imported: vide *Rowlandson* v. *Champion*[2] and *Sriramulu Naidu* v. *Andalammal*[3], which accepts its authority on the point. *Alimahmad Abdul Hussein* v. *Vadilal Devchand*[4] however sees no reason for the distinction and extends the rule to immovable property.

Now the avowed object of circumventing the strict letter of the statute is to protect innocent third parties dealing with the insolvent. If so there would seem to be no reason for extending the protection to those that have notice of the bankruptcy, and much less to those that have the knowledge that the person that they are dealing with has not obtained his discharge. The analogous cases cited of those before the fiat restricts the protection to those who have no knowledge of the act of bankruptcy or the presentation of the petition.

We may take the analogy of a person, apart from insolvency, assigning his property not *in esse* but *in futuro*. Such an assignment has, after some struggle, obtained recognition in law. In order however to give protection to intervening purchasers (including in this term all lesser kind of dealing for value), it has been stated that the prior interest is an equitable interest which will not prevail as against a *bona fide* purchaser for value—*bona fide* implying want of knowledge of the prior assignment. No doubt under the Indian Law the distinction between legal and equitable estates is not quite valid and an agreement to convey does not create any interest in the property. Still the specific performance of a contract to sell cannot be enforced against a subsequent purchaser for value without notice. If we apply the analogy to the case of the compulsory assignment in bankruptcy, we get the protection given by *Cohen* v.

1. (.890) 25 Q B. D. 262. 2. (1893) I. L. R. 17 Mad. 21
3. (1906) I. L. R. 30 Mad. 145: 17 M. L. J. 14.
4 (1919) I. L. R. 43 Bom. 890.

Mitchell[1] in its widest interpretation with this qualification that the third person should have no notice of the bankruptcy. There is no hardship in the matter either. The knowledge of the bankruptcy should put him on enquiry and there is no equity in favour of the person who would not make the enquiry. Even this is an extension in violation of the terms of the statute.

In England the rule in *Cohen* v. *Mitchell*[1] was adopted in later cases, though an exception to the rule was recognised in respect of real estates—legal and equitable—without reason until the legislature in 1914 finally set its approval to the rule in its widest ambit including real estates also.

In India in the Presidency towns the law in force at present is the Act of 1909. Naturally the provisions resemble the provisions of the statute then in force in England. Thus though the clear language of the later English statute of 1914 was not available for the Indian legislature to model the terms on the terms of the rule in *Cohen* v. *Mitchell*[1], the same rule can be evolved and in fact has been evolved by decisions as was done in England prior to the statute. So far as the mofussil is concerned we have the Act of 1920, an enactment later than 1914, which however repeats the old language. A legitimate inference that can be drawn therefrom is that the legislature being aware of that statute of 1914, did not think it fit to interfere with the existing provisions. Is it the reason that it thought that the rule in *Cohen* v. *Mitchell*[1] is deducible from its terms and that there was no necessity to alter it? Or is it the reason that it thought that such a provision was not safe for the mofussil? Either alternative is somewhat difficult of acceptance. For the first, if the legislature was aware of the English Bankruptcy Act of 1914, it must have been equally aware of the necessity for the clear expression in the terms of the statute of its object in view of the confusion created by the previous variety of the interpretation and the conflict of case-law. As regards the second there seems to be no valid reason for a difference between an adjudication in the mofussil and in the metropolis. The adjudication in the mofussil station may be based on the ground of residence while the place of business may be the Presidency town and the transactions may be equally at the mofussil and in the Presidency town. There

1. (1890) 25 Q. B. D. 262.

may be a difference in the machinery between a mofussil and a metropolitan administration but there need be no difference on a matter of principle as the one now in question, based merely on the accident of the place of adjudication.

On the wording of the provisions in both the Acts—Provincial and Presidency—the interpretation to be applied must be the same, for the terms are identical almost. It is noteworthy—despite what may be supposed to be the intention of the Indian Legislature, in confirming the strict interpretation of the expression "vest forthwith," and from its abstention from adopting the language of the English Act of 1914 in its enactment of the Act V of 1920—that the trend of decision under both the Acts has been to adopt the rule in *Cohen* v. *Mitchell*[1], now embodied in England in the Act of 1914. A different note was struck in *Ma Phaw* v. *Maung Ba Thaw*[2], that the word "forthwith" found in the Act of 1920 excluded the applicability of the rule in *Cohen* v. *Mitchell*[1] to cases coming under it. The earlier decisions which followed *Cohen* v. *Mitchell*[1] were distinguished on two grounds which appear to some extent mutually inconsistent, *viz.*, (1) that the wording of S. 28 (4) was materially different from the wording of S. 7 of 11 and 12 Vict., Ch. 21, and (2) that the cases under the latter statute modified its words on grounds of convenience. The second ground is fairly intelligible, while as has been shown above the first ground is untenable. The Court however added a suggestion for the amendment of the language on the lines of the English Bankruptcy Act of 1914. The applicability of the rule in *Cohen* v. *Mitchell*[1] was not necessary for the decision of the case. For on the facts it was found that the transaction was neither *bona fide* nor for value. Further the transaction itself does not appear to be a dealing with an uncertificated bankrupt within the meaning of the rule in *Cohen* v. *Mitchell*[1]. The transaction was a partition between the insolvent and his co-heirs with reference to property inherited by them, in which the insolvent was allotted a much less than his due share and this the Official Receiver questioned. Further with the greatest respect, the appeal appears to have been dismissed under O. 41, R. 11, Civil Procedure Code, perhaps not after such discussion as was otherwise possible.

1. (1890) 25 Q. B. D. 262. 2. (1926) I. L. R. 4 Rang. 125.

The very next year, however, in *Official Assignee* v. *N. P. A. K. Chettyar Firm*[1] the same Court preferred to follow the weight and unanimity of the decisions of the various High Courts in India and accepted the principle of *Cohen* v. *Mitchell*[2]. It is to be noted however that the learned Judges were inclined to think that the strict wording of the Act is against that principle; though somewhat inconsistently with that opinion, the earlier case of *Ma Phaw* v. *Maung Ba Thaw*[3] was distinguished on the ground that the word "forthwith" occurring in the mofussil enactment did not occur in the Presidency Act.

In our High Court an opinion has been recently expressed that an authoritative consideration by a Full Bench of the applicability of the rule in *Cohen* v. *Mitchell*[2] to cases under the Indian Acts—especially under the Provincial Act—would be necessary in view of the decision of the Privy Council in *Kala Chand Banerjee* v. *Jagannath Marwari*[4].

This decision of the Privy Council is not one on the matter on hand. The exact point at issue there was the necessity of impleading the Official Receiver as party as owner of the equity of redemption in a suit by a mortgagee. The argument against such a necessity was based on S. 16 (5) of the Act of 1907 which preserved the rights of the secured creditors in spite of the insolvency. The Privy Council repelled this argument which had been accepted by the High Court. It is to be noted that the argument for either position is equally applicable in respect of pre-adjudication property of the insolvent. No doubt in this case the mortgagor having died during the pendency of the suit the property devolved on the son who had been adjudicated insolvent. Further is the case in question one of dealing with the property within the meaning of the rule in *Cohen* v. *Mitchell*[2]?

There is perhaps an understandable distinction between the case of a bankrupt as a plaintiff representing the trustee for obtaining a benefit to the estate and one as a defendant where he is to be bound or to be foreclosed with reference to property.

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1. (1927) I. L. R. 5 Rang. 229. 2 (1890) 25 Q. B. D. 262.
3. (1926) I. L. R. 4 Rang. 125.
4. (1921) L. R. 54 I. A. 190: I. L. R. 54 Cal. 595: 52 M. L. J. 734 (P. C.).

The Privy Council no doubt at one place stresses on the word "forthwith" but with reference to another matter and another argument.

The consideration by the Full Bench of this question has not yet happened and the Legislature has not yet taken up the matter to place it beyond doubt in India. In the meantime it is believed that the requirements of the construction of the statutes and the equities in favour of innocent third parties would be met by treating the assignment by operation of law effected by the vesting order on a footing analogous to that by act of parties in regard to property *in futuro* and giving protection to all persons who have dealt with the insolvent for value but without notice of the bankruptcy.

R. KRISHNASWAMI,
Advocate, Madras.

LEGAL DISABILITIES OF UNTOUCHABLE CLASSES.

The following has been sent to us for publication by Mr. Jerome A. Saldanha, B.A., LL.B., Ex M. L. C., Mangalore:—

We are not concerned here with the social and religious disabilities of the several castes and classes in India called Untouchable or Depressed, but the legal disabilities which prevent them from the use of public places maintained out of public funds, and freedom of contract and movement. There is no definition of "public" in our Imperial Acts so far as can be traced. *The Madras General Clauses Act* lays down that the term "public" includes "any class of the public or any community".

The Places of Public Resort Act (Mad. II of 1888) provides for the inspection of places of public resort and entertainment and licensing of the same by competent authority, but it does not apply to places of public worship. It must be borne in mind that places of public worship, churches, temples, mosques and so on are not open to all the public but are confined to bodies of particular religion, sect or caste for whose use they are constructed or established and maintained. Thus churches exclusively meant for a particular sect of Christians exclusively are not open to other sects whose creed or rites differ essentially from those of the former. There are temples

which from ancient usage are confined to members of a particular caste or castes, or community privileged to use them, from which others not so privileged may be excluded by injunction from Courts, Magistrates or the Police. We have the interesting case of *Anandrav* v. *Shankar Daji*[1], in which the Chitpavan Brahmins sought to exclude a particular class of Brahmins (Palshes). Their suit was upheld on the ground that it was established by immemorial usage that the use of the temple had been confined to Chitpavan and some other privileged Brahmins to the exclusion of the defendants.

The principle of this ruling though not the form of action was followed in the Parsi case of Rangoon in which a person not belonging strictly to the Parsi community by race and caste (though Zoroastrian in religion) was held not entitled to the use of the Parsi temple in Rangoon, *Saklat* v. *Bella*[2], which relied upon the famous Bombay Parsi case *Sir Dinshaw Manekji Petit* v. *Sir Jamsetji Jijibhai*[3].

The Madras Courts also have had to decide on rights of lower castes to temple entry. In upholding the claim of a certain class of Brahmins to enter the inner precincts of a temple in *Venkatachalapathi* v. *Subbarayudu*[4] the Judges quoted without dissent the following observations of the Court of the first instance:—

> "A temple of course is intended for all castes, but there are restrictions on entry. Pariahs cannot go into the court of the temple even. Sudras and Banyas cannot go into the hall of the temple. Brahmins can go into the holy of holies."

Reference here may be made to *Dewan of Travancore* v. *Vaki Jeraji*[5] in which it was held that a Bhatia though a foreigner was entitled to worship from the hall of the famous temple Ambalapuzha in Travancore. In *Gopala* v. *Dharmakarta Subramanya Aiyar*[6] the right of Illawayar caste (Sudra) in Tinnevelly to worship in the Wahamandapam (or the outer big hall next to the central half hall which is next to the holy of holies—garbagriham) was upheld.

The Madras High Court has had to consider also the claim of the once backward castes like the Shanars or Nadars rising in status by taking to more respectful or respected occupations—

1. (1883) I.L.R. 7 Bom. 323.
2. (1925) I. L. R. 3 R. 582: 49 M. L. J. 821 (P. C.).
3. (1908) I.L.R. 33 B. 509.
4. (1890) I.L.R. 13 Mad. 293.
5. 14 T. L. R. 56.
6. (1914) 18 M. L. R. 410.

agriculture, trade or money-lending, to entry into Hindu temples reserved to higher castes, including even Sudras like Vellalas and Marawars, but denied to non-caste people and untouchables. This claim on the part of Nadars was rejected by the High Court of Madras in a case of the Madura District, in which caste orthodoxy was once stuck to with great tenacity. This decision upheld by the Privy Council, even after the original plaintiff—the hereditary trustee—had given in at the last moment, to save the consequence of which the High Court re-inforced the cause of the orthodox worshippers by adding some of them as plaintiffs. *Sankaralinga Nadan* v. *Rajeswara Dorai*[1].

The claim of the same community to the use of a public well in a village in the same district was rejected by the Madras High Court in *Mariappa Goundan* v. *Vaithilinga Mudaliar*[2] while the claim as to the use of the public tank close by was allowed as less liable to pollution and more capable of removal of pollution nearly like a river. The following remarks of Justice Sadasiva Aiyar, a social and religious reformer, in delivering his judgment, are pertinent as applying the awakening of the public conscience in the country:

"While the function of courts no doubt is to ascertain, compare, explain and ratify the statutory, customary and common laws, and not to create laws, Courts could not be deprived of the power of moving slowly with the better sense of the community, which is changing its custom for the better."

So far as Hindu converts to Christianity maintaining with some vigour the Hindu caste system socially are concerned, the Madras High Court has rejected the claim of superior castes to relegate lower castes to particular portions of a church even by agreement against the wishes of the ecclesiastical authorities (*Kattalai M. Pillai* v. *Bishop of Trichinopoly*[3]). But the custom of allocation of particular parts of churches according to castes still persists in several churches in South India.

LEGISLATION AS TO PUBLIC PLACES BEING OPEN TO ALL CLASSES.

A Bill was brought by Mr. Veerian which passed into Madras Act I of 1927 amending the Madras Local Boards Act, 1920.

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1. (1908) L.R. 35 I. A. 176: I. L. R. 31 Mad. 236: 18 M. L. J. 387 (P.C).
2. 1913 M. W. N. 247.
3. (1916) 30 M. L. J. 423.

After S. 157 *add* as below—

"157A. All roads vested in or maintained by Local Boards shall be open to persons of whatever caste or creed."

In S. 167 after the words "Public markets" *add*—

"and such markets shall be open to persons of whatever caste or creed."

This amending Act further makes obstruction of the use of public roads and markets punishable with a fine of Rs. 100.

A more comprehensive Bill was brought by the writer to amend the District Municipalities Act, 1920, which was enacted into Madras Act XVI of 1929 under which Ss. 180-A and 227-A were inserted and S. 259 was amended.

They provide that all streets vested in or to be vested in or maintained by a Municipal Council shall be open to persons of whatever creed or caste, that all wells, tanks and reservoirs (not private property), when maintained by the Municipal Council, shall be open for use and enjoyment to persons of whatever creed or caste, and that all markets constructed, repaired or maintained out of Municipal funds (therefore deemed to be public markets) shall be open to persons of whatever caste or creed. Obstruction thereto is rendered penal and liable to a fine of Rs. 100.

The importance of these provisions lies not so much in the declaration of the rights of all castes or creeds to the use of public roads, wells, markets, which is common law of the country, but in converting roads, wells and markets maintained out of Municipal funds into public ones and making obstruction to the use of them punishable. It may be mentioned by the way that all public roads and streets vested in any local authority, it is declared in Land Encroachment Act (Madras Act III of 1905), for the purposes of that Act, are deemed to be property of Government.

The need for some stringent legislation like the Amending Acts mentioned was felt keenly from the existence of various restrictions on the freedom of movement from place to place even along public streets and on the use of public markets and wells especially in Malabar, in which district Mahatma Gandhi has discovered such a thing as invisibility besides untouchability as a disability of the depressed classes.

The common law as to the use of public streets was propounded by the Privy Council in *Sadagopa Chariar* v. *Rama Rao*[1] affirming the Madras High Court's decision in *Sadagopachariar* v. *Rama Rao*[2] that all streets in a ryotwari village are public streets vested in Local Boards and that all members of the public have equal rights in them in a lawful manner. The following quotation from the judgment of the Madras High Court appealed against in the case is pertinent here:—

> "We do not think that the custom which the plaintiffs plead is a reasonable one or such as Courts should recognise any more than the Courts would recognise the practice widely prevalent in Malabar by which men of the Cheruman caste are obliged to leave the public road if they meet of the Nair caste on it."

This ruling was followed in *Baslingappa* v. *Dharmappa*[3], *Dundappa* v. *Secretary of State*[4] and *Mannada Mudali* v. *Nallaya Goundan*[5].

Slavery in the shape of serfdom of the labouring classes survives in several places in India, especially in Malabar and South Kanara, which the Workmen's Breach of Contract Act, Madras Planters' Labour Act, Assam Planters' Labour Act and other such labour legislation sought to extend to coffee, tea and rubber plantations. But happily the first has been repealed by the Legislative Assembly, the second has been repealed as a result of the writer's Bill to amend it so far as the penal provisions were concerned, and the other labour legislation has been amended or ended so as to remove every vestige restrictions on the freedom of contract. Further, if all the recommendations of the Royal (Whitley) Labour Commission are carried out, the conditions of workmen and labourers largely recruited from the depressed classes will be free from several oppressing features.

Further, the amendment of legislation of Local Boards and Municipal Acts referred to above ought to be supplemented by more comprehensive provisions for removing several other disabilities that depressed classes still suffer especially in villages.

J. A. SALDANHA, B.A., LL.B.,
Ex M. L. C., Mangalore.

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1. (1907) L. R. 34 I.A. 93: I. L. R. 30 Mad. 185: 17 M. L. J. 240 (P. C.).
2. (1902) I.L.R. 26 M. 376. 3. (1910) I. L. R. 34 Bom. 571.
4. (1916) 18 Bom. L. R. 460.
5. (1909) I.L.R. 32 M. 527: 19 M. L. J. 467.

SUMMARY OF ENGLISH AND PRIVY COUNCIL CASES.

BANCO DE PORTUGAL *v.* WATERLOW & SONS, LTD., (1932) A. C. 452: 101 L. J. K. B. 417.

Damages—Breach of a term of contract—Contract for printing and supply of Bank notes—Term of contract not to print notes except on bank's express authority—Printing of large number of notes without bank's consent or knowledge—Circulation of such notes—Loss to the bank—Measure of damages.

In 1922 the Banco de Portugal entered into a contract with the W. Company (defendants) for the printing and supply of Portuguese bank notes. The Bank had an exclusive licence for the issue of bank notes as legal tender in Portugal and the currency was inconvertible. According to the contract, W. Company supplied to the Bank 6,00,000 notes of a face value of 500 escudos and the Company had also agreed with the Bank not to print notes from the plates in their possession without authority or knowledge of the Bank. But 5,80,000 notes of 500 escudos were unlawfully printed at the company with the help of the original plates or impression of it and put into circulation by a group of criminals. They were very much like the genuine ones and could not be distinguished easily. As soon as the Bank saw the forgery, they resolved to withdraw from circulation the notes of 500 escudos made from that plate and exchange them for others of the same or other denomination at their Bank and on December 7 issued a notice that all 500 escudo notes be exchanged by December 26. As a result, the forged notes also were received by the Bank and paid for during that period The Bank thereupon brought a suit against W. Co., for damages for breach of contract, negligence or conversion and claimed as damages the face value of the unauthorised notes paid by them. It was contended for the defence that the loss if any was caused solely by the Bank's own voluntary act in withdrawing them from circulation and exchanging them for other notes, and that in any event the damages were only the cost of printing the new issue of notes and not the amounts which the Bank chose to give in exchange for the forged otes.

Held, that the defendants, W. Co., were liable for the loss sustained by the plaintiffs by the reissue between the 7th and 26th December, and that the loss arose naturally in the usual course of things as a result of the breach. The withdrawal of the whole issue was a reasonable and indeed the only practicable step for the Bank to take in order to remedy the situation which had arisen and maintain its credit.

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As regards the quantum of damages, held by a majority Viscount Sankey L.C, Lord Atkin and Lord Macmillan (Lord Warrington of Clyffe and Lord Russell of Killowen dissenting), that the proper measure of damages was the face value of the notes exchanged by the Bank for the unauthorised notes and the cost of printing them. The position is "that the Bank by issuing its promise to pay a fixed sum issues a bit of its credit to that amount; like the trader, it is bound to pay the face value in currency; like the trader, it is liable on default to judgment for the face value exigible out of its assets; and like the trader, if it is compelled by the wrong of another to incur that liability, its damages are measured by the liability it has incurred." This liability is in no way affected by the question of convertibility.

WILKINS *v.* LEIGHTON, (1932) 2 Ch. 106.

Damages—Nuisance—House on a natural steep slope with a retaining wall—Adjoining land built on—Collapse of retaining wall by pressure of the new house—Liability of the owner of the new house.

About the year 1882 a house *A. H.* was built on a natural slope. When it was being built the site of the house and garden was levelled to a considerable extent. In order to prevent weathering, a retaining wall 70 feet long by 13 feet high was built by the owner of *A. H.* In 1925 the owner of the adjoining site built a house on it *B. E.* In 1931 a part of the retaining wall fell and it was found that it fell owing to the additional pressure thrust on it caused by the weight of the house *B. E.*, though its stability may have been affected also by the effect of the south-westerly gales. It was found that if the foundations of *B. E.* had been carried down to a level with the garden of *A. H.*, no additional strain would have been imposed on the wall. In an action by *A. H.* against *B. E.* for a mandatory injunction to restore the wall and for damages for nuisance,

Held, that the action failed. *Rylands* v. *Fletcher*, L. R. 3 H. L. 330 has never been applied to anything brought on land in its normal use. There has been only a normal user of the land here, namely building.

St. Anne's Well Brewery Co. v. *Roberts*, 140 L. T. 1, followed.

To make the occupier liable for nuisance, the plaintiff must prove that he had knowledge of the existence of the nuisance and as there was no evidence to show that the defendant knew of the existence of any nuisance or was guilty of any negligence, the action failed even on that ground.

GENERAL MEDICAL COUNCIL *v.* WARING, (1932) 2 Ch. 115.

Dentists Act, 1921—Constitution of Dental Board—Qualification of members thereof—Nominee of General Medical Council—Also a member of Branch Council—If ceases also to be member of Dental Board, though before normal expiry of term.

H became a member of the Dental Board as one of the three members appointed by the General Council of Medical Education, etc., in 1929, his qualification being that he was a member of the Branch Council for England of the General Medical Council. In 1932, *H* ceased to be a member of the Branch Council and but for it, he would have been member of the Board till 1934. The question arose if his appointment to the Board terminated by reason of his ceasing to be a member of the Branch Council.

Held, that though there is no express provision in the act to the effect that the loss of the particular qualification for appointment should disqualify a member from continuing to hold office, yet from the careful manner in which provision is made for the constitution of the Board insisting on a qualification as a condition precedent to election, it is reasonable to hold that such qualification should continue to be held during the period of office.

In re BURFORD. BURFORD *v.* CLIFFORD, (1932) 2 Ch. 122: 101 L. J, Ch. 321.

Practice—R. S. C., O. XVI-A, R. (1) cls. (b) *and* (c)*—Third party notice—Trust fund lost by administrators and their solicitors—Claim by beneficiaries against both of them—Third party notice by administrators to their solicitors—If and when issuable.*

W. B. and *G. B.*, the administrators with the will annexed employed *C* as solicitors with regard to the administration of the estate of the testator. The beneficiaries under the will brought an action against the administrators *W. B.* and *G. B.* and the solicitors *C* for recovery of a sum of 1878*l.* lost to the estate during the management. It was alleged that the administrators handed to the solicitor a number of cheques signed in blank on behalf of the estate, that the solicitor in breach of trust filled in one of the cheques with the name of *A. W. Co.*, as payees, that *A. W. Co.*, were a firm of stock brokers whom *C* instructed to purchase 1800*l.* 5% War Loan for the estate, that *A. W. Co.*, received payment of the cheque but were then in insolvent circumstances and never in fact delivered the War Loan bonds. The claim was that in so dealing with 1878*l.*, the defendants *C* were guilty of a gross breach of trust. The defendants admitted the issue of the blank cheques but threw the blame one on the other for negligence and breach of trust. The defendants *W. B.* and *G. B.* thereupon served the defendants *C* with

a third party notice under R. S. C., O. XVI, R. 12 claiming (1.) to be indemnified against the plaintiff's claim or contribution and (2) for a declaration that the said sum of 1878*l.* was lost owing to *C's* negligence and breach of fiduciary duty as solicitors for the administrators. Bennet J., held that two conditions should be satisfied under R. 12 before the third party notice can be given: (1) that the defendant serving the notice has to satisfy the Court that the relief or remedy which he claims relates to the original subject-matter of the action and (2) that it must be substantially the same as some relief or remedy claimed by the plaintiff. But while plaintiffs claim restoration to the estate of the sum, the defendants *W. B.* and *G. B.* claim damages to compensate them for it, which are different reliefs.

Held, by the Court of Appeal reversing Bennet J, that the notice was proper. What is meant by 'substantially the same' is that it must be the same in substance though not in form, because it is impossible that the issues between the defendants *inter se* should ever be the same in form as between the plaintiffs and defendants. What is meant by the rule is that if the claim made by a defendant against his co-defendant is connected with the claim which the plaintiff makes against both defendants, and is one which in the event of the plaintiff being successful will determine which of the two defendants ought to bear the ultimate loss, it is one in which the claim made by the defendant against his co-defendant is substantially the same as that made by the plaintiff against both the defendants within the meaning of the rule.

In re RECKITT. RECKITT *v.* RECKITT, (1932) 2 Ch. 144.

Will—Construction—Direction to pay an annuity free of income-tax—If free of sur-tax also.

By his will a testator after giving certain specific and pecuniary bequests provided by clause 12 as follows:—" I bequeath to my trustees the sum of 2,00,000*l.* upon trust to invest the same in any of the investments hereinafter authorised and to hold the said investments upon trust thereout to pay my wife during her life the annual sum of 5000*l.* free of income-tax."

Held, that sur-tax or super-tax is, in spite of some features differentiating it from income-tax, in essence an additional duty of income-tax within the income-tax statutes and therefore the freedom prescribed in cl. (12) includes freedom from super-tax as well as income-tax.

Michelham's case, 15 Tax Cases 737, followed.

In re *Bates*, (1925) Ch. 157 distinguished as a special case on the words in the will in that case.

In re *Crosse*, (1920) 1 Ch. 240 and In re *Doxat*, (1920) W. N. 262.

POWSZECHNY BANK ZWIAZKOWY W POLSCE *v.* PAROS, (1932) 2 K. B. 353.

Practice—O. XIV, R. 6, Rules of Supreme Court, 1883—Suit on a promissory note by an indorsee against the maker—Fraudulent indorsement contrary to the promise to the maker—Leave to defend conditional on payment—Validity of.

A suit was brought on a promissory note by the plaintiff as indorsee from *K* the payee against the maker. The defence was that the note was given to *K* upon the terms that he should negotiate the note only with his own bank and not otherwise but that *K* in breach of the condition fraudulently indorsed it to the plaintiff. The plaintiff filed an affidavit that he is a holder in due course of the bill having taken the said note in good faith and for value from the said *K*.

Held, that when a defendant presents a *prima facie* case of fraud in the plaintiff, the Court ought to act on that and give him leave to defend without imposing the condition that he should pay money into Court. The mere statement in the plaintiff's affidavit that he took the note in good faith and for value is not enough to decide that issue in his favour. In proceedings under O. XIV, what the Court has to ascertain is whether there is a triable issue. If there is, no matter how strongly the Court may anticipate that it will be decided in plaintiff's favour, it must order a trial.

Kodak, Ltd. v. *Alpha Film Corporation*, (1930) 2 K. B. 340 distinguished.

BAILEY *v.* MARCHIONESS CURZON OF KEDLESTON; AND SAME *v.* DUGGAN, (1932) 2 K. B. 392.

Practice and procedure—Suit on contract with mother to act as her son's 'bear leader'—Breach of contract—Suit against son for indemnity in respect of liabilities incurred for him—Consolidation of the two suits—Rules of the Supreme Court, O. XLIX, R. 8.

Two suits were brought by the plaintiff, one against the mother and the other against her son by a former marriage. The plaintiff acted as a companion to the son to exercise a general supervision over him and manage his affairs in consideration of a salary of 2*l.* 2*s.* a day and travelling allowance. The mother dismissed him from service and these actions were brought for damages for breach of the contract and wrongful dismissal against the mother and for indemnity for liabilities incurred and disbursements made by him on the son's behalf against the son. The plaintiff applied to consolidate the suits.

Held, that *Lee* v. *Arthur*, 100 L. T. 61, is no longer good law. Since then much greater latitude is allowed in making these orders, with the object of avoiding multiplicity of actions, and where various interests in one common subject-matter are involved, all the persons concerned, within reasonable limits, may now be joined as parties, so that the Court may adjudicate upon their various rights and interests.

Horwood v *Statesman Publishing Co.*, 141 L. T. 54, followed. Passage in Annual Practice, 1932, p. 875 following *Lee* v. *Arthur*, not approved.

REX *v.* DAILY HERALD. *Ex parte* THE BISHOP OF NORWICH, (1932) 2 K.B. 402.

Contempt of Court—Jurisdiction of King's Bench Division to issue writ of attachment—Complaint to Consistory Court—Publication calculated to prejudice the fair hearing of the complaint.

The King's Bench Division has inherent jurisdiction to correct an inferior Court and so also in proper circumstances to protect an inferior Court. This inherent jurisdiction over the Consistory Court remains untouched by the Ecclesiastical Courts Act, 1813 and the Ecclesiastical Courts (Contempt) Act, 1832. The King's Bench Division has therefore jurisdiction to issue a writ of attachment for contempt of the Consistory Court against the person publishing a statement tending to prejudice the fair trial of any legal issue or to interfere with the admission of justice by it. *Rex* v. *Daily Mail.* Ex parte *Farnsworth*, (1921) 2 K. B. 733; *Ricketts* v. *Bodenham*, 4 A. & E. 433; and *Burder* v. *Veley*, 12 A & E. 233 relied on.

PAYNE *v.* ALLCOCK, (1932) 2 K.B. 413.

Revenue—Finance Acts 1920, 1922, 1926, and 1928—Motor Car—Private car—License taken out as private car—Used also for conveyance of goods—Car not adapted for such purpose—If liable to duty as for a car conveying goods.

The appellant had taken out a license for a Singer Motor Car and paid the duty chargeable thereon on the basis of horse-power. The car was a private saloon and not adapted specially for use for the conveyance of goods. If charged as for a car adapted to convey goods, it was liable to a greater duty. The appellant in the course of his trade carried goods by his car occasionally.

Held, by Lord Hewart C.J. and Avory J., Macnaghten J., dissenting, that the user was wrongful. To be subject to higher duty it is enough if it should be used for the conveyance of goods. It is not

further necessary that it should be constructed or adapted for such use to fall under S. 14 of the Finance Act, 1922.

The Finance Act, 1922, S. 14 provides:—

Sub-Section (1): "Where a licence has been taken out for a mechanically-propelled vehicle at any rate under the Second Schedule to the Finance Act, 1920 and the vehicle is at any time while such licence is in force used in an altered condition or in a manner or for a purpose which brings it within, or which if it was used solely in that condition or in that manner or for that purpose would bring it within, a class or description of vehicle to which a higher rate of duty is applicable under the said schedule, duty at such higher rate shall become chargeable in respect of the licence for the vehicle."

Sub-Section (2): "Where a licence has been taken out for a mechanically-propelled vehicle, and by virtue of such user as aforesaid, a higher rate of duty becomes chargeable, and duty at the higher rate was not paid before the vechicle was so used, the person so using the vehicle shall be liable to a penalty of an amount equal to three times the difference between the duty actually paid on the licence and the amount of duty at such higher rate or twenty pounds, whichever amount is the greater"

McCall Brothers, Limited *v.* Hargreaves, (1932) 2 K. B. 423.

Bill of Exchange—Bill drawn to order of drawer—Accepted by Company—Indorsement by third party as security—Intention to make the third party liable—Subsequent indorsement by drawer but put beneath the third party's—Suit by drawer as indorser on the note—Statute of Frauds, 1677, S. 4 and Bills of Exchange Act, 1882, S. 20.

The plaintiffs, who were cloth manufacturers, were owed a large sum of money by *W. Co.*, for cloth supplied and so refused to deliver further cloth unless the account was secured and provision for payment of future deliveries made. It was agreed that bills should be drawn on and accepted by the *W. Co.*, and they should be indorsed by the defendant without recourse against the plaintiffs as drawers. It was orally agreed that the defendant was to make himself responsible on the bills. Bills were drawn on the *W. Co*, and accepted by them. The defendant signed on the back of the bills and the plaintiffs subsequently indorsed them, writing their name underneath and not above that of the defendant. In an action on the bills,

Held, that under S. 20 of the Bills of Exchange Act, 1882, the drawers have authority to complete the bills by adding their indorsement and it does not matter whether the drawer's indorsement is written above that of the defendant, or as here below.

McDonald (Gerald) & Co. v *Nash & Co.,* (1924) A. C. 625 and *National Sales Corporation, Ltd.* v. *Bernardi,* (1931) 2 K. B 188 followed *Shaw & Co.* v. *Holland,* (1913) 2 K. B. 15 must be deemed to be overruled by *McDonald's case.*

Though in one sense the agreement is one of a guarantee for the acceptor, the true effect of the agreement by the defendant is that he undertakes all the liabilities of an indorser and agrees that he will not have recourse against the drawer who is also the holder. The Statute of Frauds was not therefore an answer to a claim on the bill.

Steele v. *M'Kinlay,* 5 A. C. 754 followed.

Singer v. *Elliot,* 4 Times L. R. 524 doubted and distinguished.

Jenkins & Sons v. *Coomber,* (1898) 2 Q. B. 168 distinguished as a case of an action on the verbal agreement and not on the bill.

In re DIGBY AND PENNY, (1932) 2 K. B. 491.

Landlord and tenant—Agricultural Holdings Act—Notice to quit—Reasons not specifically given but stating as " in accordance with S. 12, sub-Sec. (1)"—If valid.

The Agricultural Holdings Act, 1923, provides that when a landlord turns out a tenant by a notice to quit, he must pay him compensation for disturbance, unless he sets out in the notice to quit that it is for any of the six reasons set out in S. 12, sub-Sec. (1) of the Act. The landlord gave a notice to quit which did not enumerate the reasons but merely said "In accordance with S. 12, sub-Sec. (1) (*a*) and (*b*) of the Agricultural Holdings Act, 1923, we. . . .give you notice to quit . . . ." The tenant quitted the holding but claimed compensation for disturbance.

Held, that there is nothing unreasonable in supposing that the tenant was acquainted with the terms of the statute under which he held his farm, that as the notice said it was in accordance with S. 12, it was enough and it is not necessary that the reasons should be more definitely given. The claim to compensation therefore failed.

PLACE *v.* SEARLE, (1932) 2 K. B. 497.

Husband and wife—Enticement of wife by a stranger—Liability to damages.

In an action for damages by a husband alleging that the defendant had, without justification, persuaded his wife to leave him.

Held, by McCardie, J., that in view of the recognition of freedom of movement in women by modern legislation and modern decisions, *Winsmore* v. *Greenbank*, (1745) Willes 577 is no longer good law. The action cannot be rested on the same footing as that which lies for knowingly procuring a breach of contract, because no action will lie by husband against the wife for failure to discharge her domestic duties or by the wife against the husband for failure to fulfil his duties as husband.

Held, by the Court of Appeal (reversing McCardie, J.) that at the present day a husband has a right to the consortium of his wife and the wife to the consortium of her husband, and that each has a cause of action against a third party who, without justification, destroys that consortium. The methods of enforcing the right to consortium has materially weakened in the modern law but there are still means of enforcing the right. A person who procures, entices or persuades a wife to violate her duty to reside and consort with her husband commits a wrong towards the husband for which he is entitled to recover damages, unless the person who procured, enticed or persuaded her acted from ' principles of humanity'.

Sanderson v. *Hudson*, Times Newspaper, January 29, 1923, not approved. *Winsmore* v. *Greenbank*, (1745) Willes 577 yet good law.

TEMPERANCE LOAN FUND, LIMITED *v.* ROSE, (1932) 2 K. B. 522.

Money-lenders' Act, S. 6—Money-lender—Memorandum of renewal of loan—Surety for the repayment thereof—Omission of memorandum to comply with the requirements of the Act—Invalidity of the memorandum—Unenforceability against debtor—Surety if released.

R and *C* executed a joint and several promissory note on July 30, 1929, in renewal of a loan of January 30, 1929, which was to be repaid by the renewed date but was not. Along with the pro-note, a memorandum of the contract between the money-lender and the borrower was reduced to writing but it did not comply with the Money-lenders' Act in that it did not clearly show when the loan was made. It was held by the Court that the Court had no power to amend the memorandum, that the omission was a material omission and not merely a clerical error and vitiated the transaction and was therefore unenforceable against the debtor.

Held, that as the memorandum was bad as against the borrower, it was bad against the surety also. If it be held otherwise, the result

will be that the statute gives a defence to the borrower who has no merits, and who has had the money, but refuses a similar defence to a person who signs merely as guarantor and who has not had the money.

WINNIPEG ELECTRIC CO. *v.* JACOB GEEL, P. C A. No. 13 of 1932, dated 27th July, 1932.

(Manitoba) Motor Vehicles Act, S. 62—Burden of proof—Points to be proved by plaintiff—Plea of no negligence—Proof of—Evidence evenly balanced—Effect of.

Apart from S. 62, a plaintiff claiming damages for personal injury in a running down case would have to prove that he was injured, that his injury was due to the defendant's fault and the fact and extent of his loss and damage ; hence unless he succeeds in establishing all these matters he must fail. In virtue however of the statute he need only establish the first and the third elements, *i.e.*, that he was injured by the defendant and the extent of his damages. If he establishes those two matters, the onus is removed from him and it is then for the defendant to establish to the reasonable satisfaction of the jury, that the loss, damage or injury did not arise through the negligence or improper conduct of himself or his servants. This the defendant may do in various ways, as for instance, by satisfactory proof of a latent defect, or by proof that the plaintiff was the author of his own injury, or by proof that the circumstances were such that neither party was to blame because neither party could avoid the other. But the onus which the section places on the defendant is not in law a shifting or transitory onus. It remains on the defendant until the very end of the case when the question must be determined whether or not the defendant has sufficiently shown that he did not in fact cause the accident by his negligence. If on the whole of the evidence, the defendant establishes this to the satisfaction of the jury, he will be entitled to judgment; if however the issue is left in doubt or the evidence is balanced, even then the defendant will be held liable in virtue of the statutory onus, whereas in that event but for the statute the plaintiff would fail, because but for the statute the onus would be on him. *A fortiori* the defendant will be held liable, if the evidence actually establishes his negligence. (Lord Wright).

JOTTINGS AND CUTTINGS.

Speedometers —Magistrates throughout the country—and in the Metropolis—who have to deal with the excess of speed limits, are continually faced with the excuse that the defendant had no "speedometer" and did not know how fast he was going. Quite

lately it appeared that the Post Office vans—or some of them—are lacking in this useful article of equipment, and some strong words were said about the Postmaster-General and his duty to supply them. There may be such a duty if we look at the matter from the moral —or shall we say social—point of view: but at present there is no law that any vehicle at all shall carry a speedometer. When we get to the year 1933 the Minister of Transport's requirement that public service vehicles shall have speedometers will come into operation; and it is indeed strange that he should not have thought of requiring them until April of the present year. In view of what the magistrates so often say, we think it would be wise for the Minister to order them for all vehicles which are still confined to a certain speed limit. Though the excuse so often offered is no good in law, it does elicit sympathy—perhaps in cases where that sympathy is not deserved.—*L. J., 1932, p. 204.*

Lawyers in Parliament.—Vacation ends with the lawyers in Parliament very much as they were at the beginning. The ship of Government is, perhaps, less National than it was, but it shows no immediate signs of foundering or distress. Some young lawyers, disliking the flag or the direction of the voyage, have resigned their commissions and set out with Sir Herbert Samuel for what they believe to be a better destination Sir John Simon, however, remains; to the relief of those silks who would suffer if Sir John returned once more to the Bar and to that pre-eminence at the Bar which he alone appears to be able to resume at will. Despite the criticisms of those who did not like the legality of the German note —ascribed by popular opinion to his pen—he continues with unabated confidence on the quarter-deck and will never desert Mr. Micawber.

Lord Hailsham, Sir John's former and most formidable opponent at the Bar, appears to have greatly enhanced his reputation in Canada, not only at the Ottawa Conference, but particularly at the meeting of the Canadian Bar Association at Calgary. Nor did he hesitate to unbend in recreation hours. Although he was well and truly beaten in a cow-milking competition by a French Canadian lawyer and another transatlantic competitor, he is said to have completed the course without faltering and to have come in a good and sporting third.—*L. J., 1932, p. 218.*

Changing Law and Irish Precedents.—Events continue to provide the British Commonwealth of Nations with startling precedents, and there is no knowing where they will end. The resignation of Mr. McNeill is the latest constitutional phenomenon; and one won-

ders whether, in the queer development of our Constitution, it will become normal for a new Governor-General, or even a new King, to appear with every change of Government. One thing is certain. Constitutional law, the doctrine of Sovereignty as taught by Austin and explained by Dicey, is no longer adequate even as a theory with exceptions. The whole textbook will have to be re-written; but the learned author would do well to wait for further developments before committing himself to the new exposition.

Theoretically and technically, the passing of Mr. McNeill is in accordance with orthodox constitutional practice. For Mr. de Valera and the members of his Government are His Majesty's Ministers in the Irish Free State; and in accepting the resignation of Mr. McNeill, the King has acted in accordance with the advice of the Ministers aforesaid. So far, well. But suppose the Ministers advise His Majesty not to appoint any successor?—*L. J., 1932, p. 221.*

Lord Sankey on New Lawyers.—Lord Sankey was not unaware of the changes in common and constitutional law now proceeding so obviously before our eyes when, at Cambridge, he made reference to Maitland and Kenny, and observed that in a country where everybody is presumed to know the law it would not be a bad thing if those who were called upon to guide the destinies of the Empire should receive some elementary instruction in the law. But will that suffice?

According to the Lord Chancellor, " we are now on the threshold of an epoch of profound legal transformation. Our educational methods have to breed a race of lawyers able to utilise the spirit of law reform for the highest uses. They have to teach the importance at once of stability and change. To do so they must know not only how to grasp the philosophic content of legal decisions. We must turn out lawyers with a courage to criticise what is accepted, to construct what is necessary for new situations, new developments, and new duties both at home and abroad."

I wonder if amongst the " lawyers and teachers of the law " who bear the " burden of responsibility for the future happiness of England and the Empire," the Lord Chancellor included the Judges? If so, McCardie, J., is justified by the highest judicial personage for many utterances for which he has been so harshly criticised.—*L. J., 1932, p. 221.*

A Question of Sanctuary.—An unusual interruption of the Sunday morning service at St. Martin's-in-the-Fields Church recently has been the subject-matter of certain newspaper comment. The

facts were that a detective followed into church a man suspected of theft, and during the collection passed the plate to the suspect, who (it was alleged) promptly extracted half-a-crown in skilful manner from the plate. He was immediately arrested and charged with theft, but Mr. Graham Campbell (Bow Street) dismissed the case. Newspaper readers have commented on what they regard as having been a totally unnecessary interruption of Divine service; be that as it may, the correspondent who interests us is he who writes that, "Under the old institution of sanctuary such an outrage would have been impossible. Church soil was sanctified and protected from human punishment all who fled there." We have little patience with statements of this kind, for the privilege of sanctuary contained many important exceptions. Thus, persons apprehended with the stolen property on them could not afterwards take sanctuary; and we have it on the authority of "Coke" (Third Inst. 115) that felonies committed in churches always prevented the offender from availing himself of the privilege.—*S. J., 1932, p. 674.*

A New Arsenical Poison Terror.—At a recent inquest at New Brighton upon the death of a widow woman, it was disclosed that she had eaten four "rat-poison" biscuits left on the table by her son. The son, giving evidence, stated that he had been informed by the person from whom he obtained the biscuits that they were "not injurious to human beings." In appearance the biscuits were exactly like ordinary edible biscuits, with composition in the centre and bore no indication of their nature or of the purpose for which they were intended. The county analyst gave evidence that they contained arsenic, and the woman had taken a fatal dose—though death was in fact due to shock and exhaustion following the washing out of the deceased's stomach after discovery of the mistake. Witness was of the opinion that the word "poison" ought to have been moulded on the biscuits and that they should have been coloured green. This was, of course, what should have been done; but we should like to know this: There is an Arsenic Act on the Statute Book which forbids the sale of arsenic except by qualified chemists, and also makes it an offence even for a chemist to sell it without adding colouring matter so as to prevent the possibility of its being taken in mistake. Yet this most deadly of all poisonous substances may be handed about in plain biscuits after the manner disclosed at the New Brighton inquest, and as, presumably, products of this kind may be said to come within the ambit of requisites for "agricultural" purposes (rat destruction being a distinctly agricultural necessity) there is nothing to prevent any village grocer from being licensed to sell these biscuits under the

1908 Regulations, which permit of the licensing of any person without any chemical knowledge or qualification to sell them!—*S. J., 1932, p. 675.*

The Solicitor's Right of Audience.—A useful statement of the tribunals in which solicitors have a right of audience was contained in the paper on this subject read at the Bristol Meeting by Mr. Wortley, of Mirfield, and of the Law Department, London School of Economics. He showed how various are the tribunals before which the question may arise, and how the right of audience is determined partly by usage and partly by statute. In new legislation there is frequently a desire to exclude legal assistance, but in general this has been successfully resisted; and with the spread of quasi-tribunals, or tribunals which are bureaucratic in their nature, it is essential that the individual should be entitled to legal help. Whether the solicitor's right of audience is to be excluded in favour of counsel is another question, and in general, the solicitor has an equal right of audience in the inferior Courts, though he is excluded in the High Court, save in bankruptcy, and in the Court of Appeal, including bankruptcy. His right of audience at Quarter Sessions depends on local conditions, and the Law Society might well adopt Mr. Wortley's suggestion and provide an annual statement of the Courts of Quarter Session and other Courts that allow the right. Practical convenience also points to the adoption of his suggestious for the relaxation of the rules which forbid one solicitor to act for another in the County Court, and which also forbid managing clerks to appear there. Everyone knows that a managing clerk is often most competent in the conduct of legal business. Altogether usage and statute have left the solicitor's right of audience in a much too complicated condition.—*L. J., 1932, p. 224.*

Writs of Elegit.—The little town of Beccles in Suffolk was the scene recently of a Shrieval Court of Enquiry into a writ of elegit, the first held in the county for fifty years. The subject-matter involved would have appeared very strange to the draughtsmen of the statute 13 Edw. I, for it concerned only a small cottage owned by a local railway porter, and purchased for 60*l*. The jury impanelled duly found the defendant porter to be the owner, judged 9*l*. 2*s*. a fair annual rent, and were then discharged by the Under-Sheriff "with the thanks of the County of Suffolk for their services"! A writ of elegit issues out of the High Court, recites the judgment under which it is issued, and commands the sheriff to discover of what land defendant is possessed, and its value. The sheriff's return to

the writ—of vital importance to the creditor, as upon it his position as tenant by elegit depends—sets out the result of his enquiry, and this return is filed with the writ in the Central Office of the High Court. The judgment creditor must (*vide* Land Charges Act, 1925, sec. 6 (1)) secure the registration of the writ, for otherwise this and every delivery in execution thereof is void against a purchaser of the debtor's land. Having, however, satisfied this provision, the creditor is entitled to hold the land until the debt has been paid off. —*L. J., 1932, p. 225.*

Heirs of the Body: Crown and Peerage.—The view stated in *Halsbury's Laws of England* is, indeed, the accepted view, *i.e.*, that stated by Blackstone (14th Edition, by Christian, 1803, page 193), that in the case of females the title to the Crown devolves upon the eldest daughter alone and upon her issue, whereas in the case of land the title descends upon all the daughters equally as co-parceners. As Mr. Lang observes, a peerage cannot be held in partnership or joint tenancy. Unless the King exercises his prerogative in choosing one daughter to succeed to the peerage; the title remains in abeyance until only one daughter is left. But the authorities here do not accept Mr. Lang's view that "there is no reason to suppose that the descent of the Crown would follow any other course than the descent of a peerage." The authority for the contrary view is the passage in *Blackstone,* citing as his authority a similar view of Sir Edward Coke. But Mr. Lang doubts whether, in a matter of such importance as the descent of the Crown, even these venerable dicta could be accepted as authoritative.

The succession is, of course, governed by the provisions of the Act of Settlement, 1700 (12 and 13 Wm. 3, c 2), whereby the Crown was settled on the Princess Sophia, Electress of Hanover, and the heirs of her body, being Protestants. The words, as Mr. Lang points out, are (apart from the religious limitation) "the very words which, in the case of land, would create an entailed estate." And in deciding whether, in the present problem, the elder daughter would succeed in preference to the younger, the common law rule would be applied, since, on that point, the Statute has nothing to say.—*L. J., 1932, p 230.*

Princess Elisabeth and Princess Margaret: Coke and Blackstone.—What is the common law rule? According to Coke, as accepted and cited by Blackstone, the rule of descent is not the same in the succession to the Throne, as in the succession to land or to a peerage, and the rule of primogeniture applies even in the case of females, The opinion of these masters of the common law are of

tremendous weight. The fact that Blackstone cites Coke and that Coke cites no authority is of little moment. Coke did not cite authorities for many dicta which are accepted as authoritative statements of the rules of common law obtaining in his time. There is no authority of his age or reputation who has expressed a dissenting view. That the descent of the Crown was not invariably governed by the rule applying to the descent of land is clear: For example (see *Halsbury*, Vol. VI, page 320), "there can be no doubt that the ancient doctrines with regard to land, relating to the exclusion of the half-blood from the inheritance, never had any application to the descent of the Crown, and that collaterals were always admitted provided they could trace descent from the first monarch purchaser."

Moreover, the rule as stated by Coke and Blackstone is in accordance with common sense and necessity. Suppose an event in which the two daughters of the Duke of York were left as the only persons to be considered for the succession. There could not be two Queens, and without a Queen an Act of Parliament would be impossible. Some irregular proceeding like that of 1688 would be necessary. In such circumstances it would appear that the declarations of Coke and Blackstone as to the right of the elder daughter in preference to the younger would be accepted everywhere as complete, satisfying and wholly fortunate.—*L. J., 1932, p. 230.*

Police Reports and Running-Down Cases.—Before the Vacation, a paragraph in these notes dealt with the frequent complaints made by Judges and practitioners by reason of the refusal of the police authorities in certain boroughs and counties to supply statements made by witnesses of running-down accidents to the police at or about the time of the accident. A " police report " would indeed be given for the sum of five shillings, but not the actual statements made by the witnesses. The Judges were apparently at a loss to understand the reasons for non-disclosure, and I suggested that a lawyer-M. P. might easily ask the Home Secretary the reason why.

I know now that a lawyer M. P., Dr. S.J. Peters, of Cambridge, did in fact, on December 10, 1929, following some observations of McCardie, J., ask the Home Secretary of the time, Mr. Clynes, for an explanation. He had failed to elicit any reasons from the Chief Constable. He was dealing with the case of an eye-witness who, on being approached by a solicitor engaged in the running-down case, said: " I have made a statement to the police—I shall give no other." "You will, I am sure," wrote Dr. Peters to the Home Secretary, " readily agree that the whole worth of these (police)

reports—which in nine cases out of ten are made by an officer who comes on the scene some time after the actual occurrence—lies in the statements of the independent witnesses, taken by the police at the time. . . . If the statement made by a witness at the time of the accident is to be withheld, the witness might say something altogether different when in the box and completely defeat the ends of Justice."—*L. J., 1932, p. 230.*

How the Home Secretary Answered.—It is right that I should set out, verbatim, the explanation of the Home Secretary. "I have carefully considered," wrote Mr. Clynes, "your letter of December 10 regarding the refusal of the Chief Constable of Cambridge Borough Police Force to supply you with a copy of a statement made to the police by a witness to a road accident which has given rise to civil proceedings. The practice in this matter varies in different police forces, but, so far as I am aware, the general rule in the majority of forces is similar to that followed in the present case, and is in accordance with the principles followed in the Metropolitan Police Force, which were brought to the notice of the chief officers of police generally so long ago as 1912, viz., to supply interested parties or their representatives with a statement giving the salient facts of the occurrence as ascertained by the police from their own observation, together with the names and addresses of any witnesses known to the police. While I appreciate the considerations urged in your letter, there would be grave objections to requiring the police to furnish the parties, on their application, with full copies of the police reports and any statements made by witnesses.

"The reports are made primarily with a view to the consideration of the question which is the immediate concern of the police—namely, the institution of criminal proceedings; in any event such reports are in their nature made on a confidential footing, and ought to be so regarded. Though the practice varies, many Chief Constables would have the strongest objection to the full reports and statements of witnesses being handed to third parties; and I should not be disposed to require them to furnish the documents, even if it were within my province to do so.—*L. J., 1932, p. 230.*

Black Magic.—The "Black Magic" trial in Finland reached its last stages recently when a number of persons concerned in graveyard outrages were condemned to various terms of imprisonment. Thus an unexpected chapter is added to the astonishing judicial history of sorcery. Obviously, spiritualistic phenomena

would in other times have been treated as magical, but the oddest thing about witchcraft prosecutions is that they flared up most fiercely in the sixteenth and seventeenth centuries when Europe was supposed to be emerging into a blaze of enlightenment. What can one think of the Archbishop of Treves who ascribed the particularly cold spring of 1586 to witchcraft and burnt a hundred and eighteen women in consequence? What of the case of Mrs. Hicks and her nine-year-old daughter who were hanged at Huntingdon in 1716 for selling their souls to the Devil and raising a storm by pulling off their stockings and making a lather of soap? An alleged witch was burnt at Dornoch in Scotland in 1722. A good deal of information on the subject generally can be gathered from a work on Demonology published in 1595 by Nicholas Remy, a judge of Lorraine, who in fifteen years had presided at "the capital trials of nine hundred persons more or less," who suffered death for the crime of witchcraft. In Wurzburg, Bamberg and Geneva the death rate about this time was even higher.—*S. J., 1932, p. 715.*

Queer.—The "queer arrangements" whereby a Legal Aid Society helped the poor and "made a living" recently aroused the curiosity and comment of the Chief Magistrate concerning the "mysterious society which seems to advertise for business". The solicitor concerned—who declared, after experience, that he was sorry he had anything to do with it—was asked for his opinion as to whether an action would lie, and the case, if it seemed good, was taken up "on spec." The Society received 2*s.* in the £ if the action or the proceedings were successful; and nothing if nothing was recovered. The initial opinion was given by the solicitor without fee. "Business is done in a very odd way," said Sir Chartres. High Court Judges have also expressed surprise on learning of the existence of such business arrangements in other cases.

There are some things which are not done in this country, and speculative actions, in which fees or rewards and their amount are contingent on success and the extent of the sum recovered, are opposed to the spirit and the letter of the rule whereby the conduct of both branches of the legal profession are governed. Yet in other countries the speculative action is not universally condemned. In some places it is regarded as usual to bring an action "on spec." and for the lawyers' fee and its amount to depend on the success of the proceedings and the magnitude of the sum involved. Here it is condemned, and for reasons obvious and adequate.—*L. J., 1932, p. 252.*

Lords' Privileges.—Legal and other reforms are the talk of the moment, and amongst them is the old topic of the unfinished and unamended condition of the House of Lords. That ancient House is said, once more, to be balanced on the edge of the melting-pot. And if there are changes will the still surviving privileges of a member of the House be preserved when the changes are made? At the moment every noble lord has his privileges. He is immune from arrest in respect of civil proceedings. If he should indulge in treasonable practices or commit a felony he may demand trial at the hands of his peers; if he desires to wait upon his Sovereign he has the right of personal access; if he has taken the oath and been summoned to Parliament he may speak in the Lords' House with the absolute freedom enjoyed by a member of the lower House; and he need not serve upon a jury.

Further, it would appear that if he happens to be passing through the King's forests or one of them on his way to or from Westminster, he can, "both in going and returning, kill one or two of the King's deer without warrant, in view of the forester, if he be present, or on blowing a horn, if he be absent." This right, savouring of a remote past, has not recently been exercised, or, if it has, the fact has not been published. But the other privileges as hereinbefore set out still hold good in practice: they have not fallen into desuetude.—*L. J., 1932, p. 261.*

Crime and Punishment.—In *The Times* of Wednesday last Sir Henry Dickens supplemented what he had said at the Old Bailey on the above subject by a thoughtful and carefully considered article in which, after quoting words uttered long ago by an experienced judge—"The trying of a case is as easy as shelling peas: the difficulty begins when the question of sentence arises"—he expressed entire approval of the second branch of the apophthegm. Punishment, he said in effect, should, in the first place, deter and debar. Judges had, "as late as the 'eighties," been terribly severe, but there had been an inevitable swing of the pendulum towards leniency, and the pendulum had swung too far. Sentences should be suited to the "exigency of the time," and Sir Henry showed his thought that just now some mercy should be reserved for potential victims to whom prevention meant so much more than any cure. The state of crime in this country was alarming, and youthful violence aided by the quick "get away" afforded by motor cars should divert thoughts of mercy from the "poor young men" to the victim unconscious by the roadside. Many years ago flogging had been found to be a remedy for "garrotting," and the writer thoroughly believed that the "cat" or birch should be administered to young men concerned

in such cases as blackmail, "hold-ups," or "smash-and-grab." All who know him, however slightly, will realise that Sir Henry's measured words have no anger or irritation behind them, but only goodwill and anxiety for the public weal. His views on a difficult subject will therefore be given full weight and very careful consideration.—*L. T, 1932, p. 297.*

Rulings and Opinions of the Bar Council, From August 1931 to November 1932:—Advocates receiving jewels or other articles to raise loan on behalf of clients—A complaint was received by the Bar Council against an advocate alleging that the advocate undertook to raise a loan for the client to meet the expenses of litigation and for that purpose received a jewel from the client, but failed to carry out his promise.

The Bar Council resolved as follows:—

"The Bar Council disapproves of any advocate receiving or retaining jewels or other movables in satisfaction of the claims for fees or out-fees from clients or in accepting them for the purpose of raising a loan to meet the expenses of litigation." (Resolution, dated 24-9-1931.)

Advocate receiving fees from a company of which he is a director.—A reference was made by the High Court whether it was not desirable to have a rule forbidding advocates who might be permitted to be directors of Funds from appearing for the very same Funds in suits or other proceedings and receiving remuneration. The Bar Council after going through the opinions received from the various Bar Councils in India and from the Law Society and General Council of the Bar in England resolved as follows:—

"The Bar Council agrees with the view of the Hon'ble Judges of the High Court that it is undesirable that the advocates who are permitted to be directors of Funds should appear for the Funds of which they are the directors and receive remuneration. The Bar Council agrees with the principle underlying the ruling of the English Bar on this subject, namely,

'a barrister being a member of an executive committee of a society, should not accept a brief on behalf of the society'

reported at page 2514 of the Annual Practice 1932, and also agrees with the communication received from the Calcutta Bar Council. The Bar Council is further of opinion that for the time being it is not necessary to make a statutory rule regarding this, but that it may be left as a rule of etiquette and propriety as it is in England and in Calcutta. (Resolution, dated 13-12-1931.)

Bench and the Bar Mutual relation.—The opinion of the Bar Council was requested in the following circumstances:—

(1) Whether an advocate would be acting properly and in accordance with the best traditions of the Bar in bringing to the notice of the authorities concerned, any case where the temper exhibited by a judge in court and his consequent treatment of the Bar are derogatory to the courtesy due to the members of the profession, and

(2) Which is the proper authority to be addressed in the first instance?

The Bar Council resolved as follows:—

"The answer to the first question is in the affirmative. With regard to the second question, the proper authority to be addressed is the Advocate-General or the Bar Council. The Bar Council is of opinion that it would be much better if the materials are brought to the notice of the Advocate-General or the Bar Council through the Advocates' or Bar Association in Madras, or through the local Bar, if any, in the mofussil, as the communication will then have the sanction or the authority of the associations concerned, which are likely to be better acquainted with the details of the situation." (Resolution, dated 13-12-1931.)

Duty of an advocate to give notice when specially requested by the advocate for the other party.—The opinion of the Bar Council was sought as to whether it was not obligatory on an advocate for the appellant (or petitioner) to give notice with copies of petition, affidavit, etc., to another advocate who had previously intimated the former that he had received instructions from the opposite party to appear on his behalf and take notice of and oppose any petition for stay, etc

The Bar Council gave the following opinion:—

An advocate for an appellant (or the petitioner) is not bound to supply copies of the petition, affidavit, etc., though as a matter of practice prevailing among the appellate side practitioners such copies are given free of cost. If a notice in writing is given that an advocate has actually been engaged by the opposite party to make notice of and oppose any stay motion, then the council regards it as proper that the advocate should inform him about any stay motion which he intends to make, and that it is not right that he should make the motion without giving notice to the advocate of the opposite party." (Resolution, dated 17-12-1931.)

Advocates' Dress of Khaddar Gown.—The opinion of the Bar Council was sought by an advocate whether the requirements of the rule regarding the proper dress to be worn by advocates would be

complied with if a black gown made of handspun Khaddar, but cut in the prescribed style was worn.

The Bar Council resolved as follows:—

"Under the terms of the notification of the High Court, the advocate is bound to wear a black gown prescribed by the University of Madras for the B.L. degree which is a gown made of black stuff, cut like the Cambridge B.A. gown. The Council therefore sees no objection to the advocate wearing a Khaddar gown." (Resolution, dated 17-12-1931.)

Public Prosecutor while appearing for Crown—Stipulating fee from a Private Party.—The Bar Council was requested to express its opinion as to whether it was proper for a Public Prosecutor while appearing for the Crown in an appeal by an accused person to bargain for a fee from the complainant in the case (a private party) whether or not he takes the permission of the District Magistrate to do so, and whether in such a case it was not the duty of the Public Prosecutor to disclose the fact to the appellate Court when apparently he appears on account of a notice issued to him in his capacity as Public Prosecutor.

The Bar Council agreed with the principle laid down in G. O. Nos. 710, Judicial, dated 15th April, 1913 and 1914, Judicial, dated 31st July, 1916, and was of opinion that the duties of a Public Prosecutor while appearing for the Crown were distinguishable from those while appearing for a private party and it was therefore improper for him to bargain for a fee from the complainant when he appears for the Crown, whether or not he had the permission of the Magistrate to do so. (Resolution, dated 15-3-1932).

G. O. No. 710, Judicial, dated 15th April, 1913.

Para. 3. "The Government, on a reconsideration of the matter, consider that the duties of a Public Prosecutor are distinguishable from those of a counsel representing a private party, and they are therefore of the opinion that if a pleader appears as Public Prosecutor, he cannot at the same time, represent a private party. They accordingly direct, in supersession of G. O. No. 857, Judicial, dated 28th May, 1902, that a Public Prosecutor shall not accept any engagement or fee from a private party in any case in which he appears on behalf of Government."

G. O. No. 1914, Judicial, dated 31st July, 1916.

"It was ordered in G. O. No. 710 Judicial, dated the 15th April, 1913, that a Public Prosecutor should not accept any engagement or fee from a private party in any case in which he appeared on behalf of the Government. The question has now been raised whether this

order would preclude a Public Prosecutor from accepting an engagement from the complainant in a preliminary enquiry before a Magistrate when he has not been instructed by the District Magistrate to appear on behalf of the Government.

2. The Government find that there is no uniformity of practice in regard to the acceptance of such engagements by Public Prosecutors. They, however, consider it undesirable in the public interests that a Public Prosecutor should represent a private party in an enquiry of the kind referred to. The Government accordingly direct that no Public Prosecutor shall accept a private engagement or fee to appear in a preliminary enquiry."

Advocate appearing in a Court presided over by one of his relations.—A question was raised whether it was permissible for an advocate who happened to be a relation of the Presiding Officer of a Court to appear before him.

The Bar Council was of opinion that it could not be laid down that there was any breach of etiquette or impropriety in a relation appearing. The Council accepted the principle laid down in 1931 Annual Practice, 2422 which is as follows:—

" The Council is of opinion that whilst it is unobjectionable for a barrister in the ordinary course of a general practice to accept a brief in a Court of which his father or other near relative is a Judge, it is not right for such a barrister especially to devote himself to practise in that Court. It is almost inevitable that partiality will be suspected even although there may be no real ground for such suspicion. To practise might even lead to briefs being delivered to the barrister because it was believed that his client would have an unfair advantage over his opponent.

To deal with the matter practically the Council is of opinion that it should be recognised as a rule of the profession that no barrister should habitually practise in any county Court of which his father or near relative is the Judge.

The Council finds it difficult to lay down rules which would cover all cases. There is however no objection to a barrister practising in a Court where his father is one of several judges. In such a case it is impossible to know beforehand which judge will in fact try a case. For example, it has never been considered improper for a barrister to appear before his father in the High Court or in the Court of Appeal or in the House of Lords. It is of course of the utmost importance not only to avoid partiality but even the suspicion of it. The application of the principle is largely a matter of good taste." (Resolution, dated 15-3-1932.)

Advocate instructing Prosecuting Inspector of Police.—In answer to a question whether an advocate could instruct a Prosecuting Inspector of Police who was not an advocate, the Bar Council replied that it was not proper for an advocate to do so. (Resolution, dated 15-3-1932.)

Advocate's right to consent to adjournment.—The opinion of the Bar Council was sought by an advocate whether it was not a breach of professional etiquette for an advocate to oppose an application for adjournment made on account of the illness of the advocate on the other side, merely because his client would not agree to the adjournment.

The Bar Council gave the following opinion :—

" An advocate can agree to an adjournment notwithstanding the client's unwillingness, and it may be the thing to do in many conceivable cases. To say that, is not however to say that the advocate who refuses to agree does what is professionally improper. It is a matter of taste and accommodation, not one of etiquette." (Resolution, dated 15-3-1932.)

A joint Official Liquidator appearing for a party.—An advocate who was one of the three Official Liquidators in a matter requested the Bar Council whether he could appear for one of the creditors in an application taken by him against the directors for misfeasance, while a similar application for misfeasance had also been taken by the managing liquidator.

The Bar Council was of opinion that it was not proper for him to do so. (Resolution, dated 15-9-1932.)

Client's money—How to be kept.—Having regard to the observations of the Hon'ble the Chief Justice in the course of his judgment, dated 29-8-1932 in the matter of a Pleader, an advocate applied to the Bar Council for advice as to what he should do with client's moneys in his hands when the whereabouts of the client were not known.

The Bar Council replied that the advocate must keep the client's moneys separately ear-marked so as to make it available to the client at any time he asks for it, as for instance, by depositing it in a bank or post office. (Resolution, dated 7-10-1932.)

" It is the duty of a practitioner who receives money on behalf of his client to pay that money to his client. If the client chooses to come, well and good; if he does not, it is his duty to pay him and he is not entitled to retain the money in his hands."

BOOK REVIEWS.

LECTURES ON CONTRACTS, PART II, by Mr. T. S. Venkatesa Iyer, M.A., M.L., Advocate, Madras. Price Rs. 6.

We had occasion to review the first part of this work in our pages. The second part deals with the branches of special contracts, such as, Indemnity and Guarantee, Bailments, Agency, Sale of Goods and Partnership. The method of treatment adopted by the learned author is the same as in the first part of this work. He has given a full exposition of the English and Indian law on these branches in the lecture portion and commentaries on the sections of the Indian Contract Act, the Sale of Goods Act and the Partnership Act in the later portion of the part under review. One noteworthy feature of the commentaries of the Indian Sale of Goods Act and the Partnership Act is that the learned author has given under each section of the Indian Act, the corresponding section of the English Act. This will clearly bring into view the differences, if any, between the sections of the English and Indian Acts. He has also given in the appendices, the rules framed by the Government of Madras and by the Governor-General in Council under the Indian Partnership Act. We feel sure that both the parts of the work together will fully meet the requirements of the practising lawyer and the student alike.

THE INDIAN PARTNERSHIP ACT, by Anukul Chandra Moitra, M.A., B.L.

This is a commentary on the Indian Partnership Act clearly setting out the principles underlying its several sections and giving references to the Indian decisions and the more important English decisions. The learned author has incorporated in the work, passages from leading English writers on the subject wherever necessary, to elucidate the various points. The several appendices give all useful information on the possessual law applicable to partnership suits and to the execution of decrees therein. There is also an appendix dealing with accounting and book-keeping which we hope will be found useful.

THE INDIAN PARTNERSHIP ACT, 1932, by L. B. Bhopatkar, M.A., LL.B., Advocate, High Court, Bombay and Vice-Principal, Law College, Poona. Price Rs. 5.

This is an analytical and explanatory commentary on the provisions of the Indian Partnership Act. The chief object kept in view by the author of this work is not merely to give a commentary on the Act but also to elucidate the principles underlying the provisions

of the Act by clearly setting forth and expounding the points of similarity and dissimilarity between the Indian and English Acts. A comparative table is given at the beginning of the book with a view to afford the reader a clear idea of such provisions of the Indian Partnership Act which correspond with those of the English Act and the Indian Contract Act. All the important decisions in England and India have been referred to. The appendices give all the useful information connected with the subject of partnership. We think the learned author has succeeded in making the book a reliable guide to the study of the law of partnership.

THE DOCTRINE OF LIS PENDENS, by K. G. Kale, Advocate, Bombay High Court. Price Rs. 5.

The learned author has in this book dealt with the subject of *Lis pendens* in all its phases in about 200 pages. Each chapter deals with a separate aspect of the subject. The principles underlying the rule of *lis pendens* have been carefully analysed in the various sections of the book and all the Indian and the more important English decisions have been referred to by the author in their appropriate places. We have every hope that this book will be found useful in clearing up the ideas on the subject.

PRINCIPLES OF INDIAN MERCANTILE LAW, by Sen and Banerjee, Advocates, Calcutta High Court. Price Rs. 7-8-0.

This is a book written for students who have to qualify themselves for a course of Mercantile Law of the B. Com. Course of Indian Universities and accountancy. The distinctive feature of such a work is that it should be intelligible to any lay reader without a previous knowledge of any branch of law and the learned authors have succeeded in bringing out a book of this description, the principal basis of which is the portions of the Law of Contract dealing with Sale of Goods, Partnership and Negotiable Instruments. For the benefit of the students, selected questions from the University examinations have also been appended. We have every hope that the book will be found to be of assistance to those businessmen who require an exposition of the first principles of Mercantile law and to students preparing for examinations in the same.

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NOTES OF INDIAN CASES.

NAWAB BAHADUR OF MURSHIDABAD *v.* KARNANI INDUSTRIAL BANK, LIMITED, L. R. 58 I. A. 215: I. L. R. 59 Cal. 1: 61 M. L. J. 208 (P.C.).

A limited estate in certain lands was granted by the Secretary of State for India in Council to the Nawab of Murshidabad and his heirs subject to certain conditions for the upkeep of the dignity of the Nawab for the time being and their Lordships held, in this case, that the grant did not amount to a "pension" within the meaning of section 60 (1) (*g*) of the Civil Procedure Code, or the Pensions Act or section 6 (*g*) of the Transfer of Property Act. Their Lordships have also given a definition of the term "pension" in the above enactments as implying a periodical payment of money by the Government to the pensioner. While the matter is clear on the Indian decisions where the grant is of the land itself, as in the case under notice, there is a marked conflict of authorities if the grant is an assignment of land revenue. On the language of the Pensions Act itself, there is much to be said for the view that an assignment of land revenue is contradistinguished in the Act from the term "pension" and that therefore it cannot amount to a pension within the meaning of that Act or the analogous provision of the Civil Procedure Code or the Transfer of Property Act. This is the view which has been taken by a Full Bench of the Bombay High Court in *The Secretary of State for India in Council* v. *Khemchand Jeychand*[1] and it has been followed in Madras in *Subraya Mudali* v. *Velayuda Chetty*[2], *Jogirdar Rama Rao* v. *Kottippi Thimma Reddi*[3] and

1. (1880) I. L. R. 4 Bom. 432 (F.B.).
2. (1906) I. L. R. 30 Mad. 153.
3. (1919) 11 L. W. 398.

Varadayya v. *Nammalwar*[4]. The latest decision of the Allahabad High Court where the previous cases of that Court have been referred to seems to lay down that an assignment of land revenue may be a pension within the meaning of the Pensions Act. See *Lakhmi Chand* v. *Madho Rao*[5]. The learned Judges in this case do not refer to the Full Bench decision of the Bombay High Court or the Madras decisions referred to above. So far as the Lahore High Court is concerned, there are two decisions of Division Benches in the same volume where contradictory views have been taken; apparently the attention of the learned Judges in the later case was not drawn to a decision given less than two months prior thereto where it had been held after a careful review of the decisions that a grant of land revenue would not be a pension within the meaning of the Act. See *Dunichand* v. *Gurmukh Singh*[6] and *Atma Ram* v. *Kehar Singh*[7]. If the definition given by their Lordships of the term in the case under notice is strictly adopted, it may be open to argument that an assignment of land revenue may not amount to a pension within the meaning of the enactments. Even viewed from the policy of the law, it may perhaps be suggested that it is not be advisable to enlarge the categories of inalienable property.

GHASIRAM GOENKA *v.* HARIBUX GOBARDHANDAS, I. L. R. 59 Cal. 31.

In this case, an application was made to set aside a consent decree against a defendant which had been passed at the instance of his counsel by reason of his position as such in the suit, without his having consulted the client who was present, though the fact of his presence was not known to counsel. The application was granted by the first Court but refused by the appellate court on the ground that the absence of the consent on the part of the client to the course adopted by counsel under such circumstances was no ground for setting aside the decree which was agreed to by his counsel.

At one time, there was some doubt whether counsel in this country had the same power to compromise suits, especially in the mofussil and whether the English rule should be followed. But after the decision of the Privy Council in *Sourendra*

4. (1909) 20 M. L. J. 88
5. A. I. R. 1930 All. 681.
6. A. I. R. 1930 Lah. 816.
7. A. I. R. 1930 Lah. 904.

Nath Mitra v. *Tarubala Dasi*[1] it must be taken as settled that the English rule applies to this country and in the mofussil. The case under notice was, it may be mentioned, one on the original side of the High Court.

Then, the question arises as to the effect of the consent of counsel when his client is present in court. Reliance was placed before the learned Judges on some observations in *Matthews* v. *Munster*[2] which was itself a case where the client was not present and the counsel agreed to a judgment in his absence. But there are cases where the question has been considered in which the client was present in court and which may be noticed here. *Chambers* v. *Mason*[3] was a case where the party was present and the counsel went into court after consulting the client saying that he would do what was best for the client and agreed to an order. The consent order was sought to be set aside by the client on the ground that he did not understand what was going on in the court; and it was held that the court would not enquire into the truth of such allegations and that he must be taken to have acquiesced in the order. In *Lynch* v. *Cowell*[4] the client was present throughout, but he did not interfere in the proceedings; the solicitor's clerk objected to the terms proposed by the counsel, still it was held that the counsel's consent bound the party, though the learned Judge observed that the court might interfere if the counsel exercised a clearly wrong discretion. In the later case of *Rumsey* v. *King*[5] the plaintiff was present in court and objected to his counsel agreeing to a compromise but he did not do so openly to the court when the compromise was formally announced to the court by the counsel. Still a very strong court composed of Cockburn, C.J., Blackburn and Lush, JJ., held that the compromise was binding on the client, as he did not protest and protest openly at the time to the court. In the face of these decisions, there can be no doubt the decision of the appellate court under notice is the only one that can be given under the circumstances and for the reasons given by the learned Judges. We may perhaps add that the authority of *Rumsey* v. *King*[5] is not weakened by the decision of the House of Lords in *Neale*

1. (1930) L. R. 57 I A. 133 : I. L. R. 57 C. 1311 : 58 M.L.J. 551 (P.C.).
2. (1887) 20 Q.B.D. 141.
3. (1858) 5 C.B. (N.S.) 59.
4. (1865) 12 L.T. (N.S.) 548.
5. (1876) 33 L.T. (N.S.) 728.

v. *Gordon Lennox*[6] where it was held that if a counsel whose authority has been limited by his client agrees in court in disregard of the limitation, the consent so given will not be given effect to by the court, as it has been held that it has only reference to a stage when the order of the court is not drawn up. See *Shepherd* v. *Robinson*[7] and *Little* v. *Spreadbury*[8].

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6. (1902) A. C. 465.
7. (1919) 1 K. B. 474 (C.A.).
8. (1910) 2 K. B. 658.

BISESWAR CHAUDHURI *v.* KANHAI SINGH, I. L. R. 11 Pat. 9.

Section 53 of the Provincial Insolvency Act applies only to a case of a transfer *by* the insolvent. It can have no application to cases where it is alleged that a purchase of property in the name of a third person was really benami for the insolvent. Such a case raises a question of title which can be acquired into under S. 4 of the Act. It is well established now, by a preponderance of judicial authority, that the terms of S. 4 are very wide so as to confer jurisdiction on Insolvency Courts to enquire into and adjudicate such cases even as against the claims of third parties, strangers to the insolvency proceedings. The words of this section are even wider than the corresponding sections of the Presidency Towns Act and the English Bankruptcy Act. The expressions 'title' and 'of any nature whatsoever' are deliberately used by the Indian Legislature to repel the suggestion that the *ejusdem* rule of construction is applicable.

The decision under notice also holds that S. 53 applies only to cases of a real transfer by the insolvent whereby title has passed to the transferee and that cases where it is alleged that an ostensible transfer is really a sham proceeding, not intended to pass title, can be enquired into under S. 4, irrespective of the limitation as to the period of time provided for by S. 53. S. 4 is no doubt controlled by the other provisions of the Act. This only means that such proceedings as come under the other provisions cannot be dealt with under the general provisions of S. 4 wherever special provisions are made for such cases. But transactions which do not come under such provisions may, at the discretion of the Insolvency Court, be properly enquired into in proceedings under S. 4. As in a pure benami transaction no real transfer at all is effected, such cases come under S. 4. Such transfer deeds do not require to be set aside. *Pether-perumal Chetty* v. *Muniandi Servai.*[1] It should, however, be remembered that the substantive law applicable is different. Wherever S. 53 applies, if the conditions mentioned in that section are satisfied, a Court will annul the transfer. But under S. 4 either the wider requirements of S. 53 of the Transfer of Property Act will have to be satisfied or the title must be found to be actually subsisting in the insolvent. The scope of the two

1. (1908) L. R. 35 I. A. 98: I. L. R. 35 Cal. 551: 18 M. L. J. 277 (P. C.).

sections is thus different. It may also be noted that there is a curious difference as regards the appealability of orders under S. 4 and S. 53. Orders under S. 4 are subject to a second appeal also, while an order under S. 53 annulling a transfer by a District Court is subject to only one appeal, and an order refusing to annul such transfer is appealable only with leave of Court. There is also an anomaly with regard to forum of appeal even in cases where orders are passed under S. 4. All decisions of Subordinate Courts under S. 4 are appealable only to the District Court irrespective of the value of the subject-matter whereas if the Insolvency Court refers the parties to a civil suit as it can under S. 4 and the question of title is decided by the ordinary Civil Court, the appellate forum varies with the value of the subject-matter of the suit.

RAGHUBANS NARAIN SINGH *v.* KHUB LAL SINGH, I. L. R. 11 Pat. 22 (P. C.).

A co-sharer of lands held in common is entitled, subject to paying *compensation* to the other co-sharers, to cultivate any part of it which is not being cultivated by them. The other co-sharers are not thereby ousted. They cannot obtain a decree in ejectment nor any mesne profits. The possession and cultivation being lawful and not wrongful there is no question of mesne profits. O. 20, R. 12 cannot therefore strictly apply to such cases. It would not, however, follow from this, as the Judges of the High Court thought in the above decision of the Privy Council, that the Court is not competent to decree compensation for the period subsequent to the institution of the plaint. The principle underlying the well-known decision of *Watson & Company* v. *Ramchund Dutt*[1] is a far-reaching one and, as pointed out by the Judicial Committee in the decision under review, considerations of justice equity and good concience can always be invoked by the Court to do full justice to the rights of parties and adjust the same as a matter of substantive law.

Even apart from this, on a right construction of the decree of the Court in the particular case, the successful party must be deemed to have been awarded compensation till the surrender of lands. On this point references may also be made to the

1. (1890) L. R. 17 I. A. 110: I. L. R. 18 Cal. 10 (P. C.).

decisions of the Privy Council dealing with similar orders *re* mesne profits. *Gurudas Kundu Chowdhury* v. *Hemendra Kumar Roy*,[1] *Fakharuddin Mahomed Ashan* v. *The Official Trustee of Bengal*.[2]

SACHINDRA MOHAN GHOSE *v.* RAMJASH AGARWALLA, I. L. R. 11 Pat. 98.

The learned Judges prefer to follow the decisions of the Calcutta High Court holding that not all decrees and orders are excluded from compulsory registration but only those which partake the character of documents mentioned in clauses (*b*) and (*c*) of sub-sec. 1 of S. 17 of the Registration Act. The Madras Court held in *Natesa Chetty* v. *Vengu Nachiar*[3] that all kinds of decrees and orders of Court were exempt from compulsory registration and that sub-clause (*vi*) of sub-sec. (2) was only an unnecessary and misleading surplusage. We think this view can no longer be supported. Not only is the language of the clause clearly to the contrary but the later history of the sub-clause shows that the Madras Court's argument is not tenable. Under the unamended sub-clause, there was a conflict of views as to whether compromise decrees which embody terms other than those relating to the subject-matter of the suit can claim the benefit of the exemption. In 1919, the Privy Council decided in *Hemanta Kumari Debi* v. *Midnapore Zamindari Co.*[4] that even such decrees come under sub-clause (*vi*). Since the above decision, however, the Indian Legislature has by Act XXI of 1929 amended, sub-clause (*vi*) by excluding such decrees and orders from the benefit of the proviso. This shows that the proviso cannot be taken to be an unnecessary surplusage as it would be meaningless to amend it if all kinds of decrees aad orders do not come under any clause of S. 17 at all. It follows that decrees which are documents coming under cl. (*d*) of S. 17 will require registration and, if unregistered, cannot be admitted in evidence to affect transactions relating to immovable property. Where, as in the decision under review, an unregistered compromise decree created a lease of properties and made the rent a first charge on certain specified properties,

1. (1929) L. R. 56 I. A. 290: I. L. R. 57 Cal. 1 : 58 M. L. J. 74 (P. C.).
2. (1881) L. R. 8 I. A. 197: I. L. R. 8 Cal. 179 (P. C.).
3. (1909) I. L. R. 33 Mad. 102. 20 M. L. J. 20.
4. (1919) L. R. 46 I. A. 240: I. L. R. 47 Cal. 485: 37 M. L. J. 525 (P. C.).

the terms as to the charge would not be admissible in evidence under S. 49.

MUKHDEO SINGH *v.* HARAKH NARAYAN SINGH, I. L. R. 11 Pat. 112.

This is yet another decision dealing with the question, *viz.*, "When does the money become due under Art. 132 of Limitation Act in the case of an instalment-mortgage-bond with a default clause". There is a settled conflict of views on this point among the Courts, the Allahabad and Madras view being diametrically opposite. The Privy Council have refrained from deciding the question though they recognised the conflict and also made some important observations bearing on the point. See *Pancham* v. *Ansar Husain*.[1] In the above decision of the Patna Court, the Judges have come to the same conclusion as the Madras High Court, but by a slightly different process of reasoning. Reliance is placed upon the analogy of S. 23 of the Act. The Court construed the terms of the default clause as giving rise to recurring or successive causes of action, each cause of action giving rise to a fresh start to the period of limitation. This part of the reasoning may not be quite convincing but the conclusion of the Court may well be supported as the right one. The question is fully discussed in the light of the conflicting decisions and general principles in Mitra's book on Limitation, Vol. II, pp. 1261-1266 (6th Ed.).

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1. (1926) L. R. 53 I. A 187: I. L. R. 48 All. 457 (P. C.).

PRAMATHACHANDRA KAR *v.* BHAGWANDAS MADANLAL, I. L. R. 59 Cal. 40.

A division bench of the Calcutta High Court has laid down, in this case, that dormant partners, or, to be more accurate, persons who were not known to be partners before the dissolution, are not outside the scope of section 264 of the Indian Contract Act and cannot escape liability for transactions subsequent to their retirement in the absence of the notice referred to in the section. In coming to this conclusion, the learned Judges recognize that they are departing from the whole weight of authority in Bombay and the English law on the subject.

At the outset, it may be mentioned that the language of section 264 of the Act is not as happy as it might be, with the result that the courts have been obliged to take liberties with it. The latest of such instances was when the Privy Council in *Jwaladutt Pillani* v. *Bansilal Motilal*[1] held following *Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee*[2] that an old customer was entitled to specific notice and that public notice alone would not exonerate a retired partner from liability for contracts entered into after his retirement. Again, as regards the words "persons dealing with a firm" in the section, there is some conflict of opinion as to whether they have reference only to old customers who still carry on dealings after the dissolution but whether they include also to customers who deal for the first time after the dissolution. See *Gorio* v. *Vallabhdas*[3] and *Bichhia Lal* v. *Munshi Ram*[4] and contra *Jagatchandra Bhattacharjee* v. *Gunny Hajee Ahmed*[5], *Chenchu Venkatanagiah Chetti* v. *Padmanabhan*[6], *Jwaladutt Pillani* v. *Bansilal Motilal*[7] and *Bhaishankar* v. *Lakshmi Dyeing Works*[8], though the better view seems to be that the language is more comprehensive. Again, the generality of the language of section 264 would seem to cover the case of dissolution of a partnership by the death of a partner as well, though it is specifically provided for by section 261 and may not therefore be said to fall under section 264.

Coming to the case of dormant partner's liability for future dealings of the partnership after his retirement, the law

1. (1929) L. R. 56 I. A. 174: I. L. R. 53 Bom. 414: 56 M. L. J. 739 (P.C.).
2. (1882) I. L. R. 8 Cal. 678.
3. (1915) 17 Bom. L. R. 762.
4. A. I. R. 1922 Lah. 466.
5. (1925) I. L. R. 53 Cal. 214.
6. A. I. R. 1928 Mad. 125.
7. A. I. R. 1927 Bom. 560.
8. A. I. R. 1930 Bom. 449.

in England at the date of the passing of the Indian Contract Act was undoubtedly that he was not liable even in the absence of a notice of the dissolution by his retirement. *See* Lindley on Partnership, Eighth edition, pp. 78 and 256. The matter is made perfectly clear under the English Partnership Act of 1890, section 36. It is significant to notice in this connection that Indian conditions do not seem to require a different treatment and, indeed, the Indian Partnership Act (IX of 1932) passed recently and which will come into force on the 1st October, 1932, has adopted the English rule in this respect in sections 32 and 45 of the enactment.

The Indian case-law under section 264, but for the decision of a single Judge in *Gorio* v. *Vallabhdas*,[3] which has not been followed in later cases in Bombay, has been uniform. The earliest decision was of the Madras High Court in *Ramasami* v. *Kadar Bibi*[9] as early as 1886. This decision is not noticed by the learned Judges in the case under notice. Though the judgment in the Madras case which adopted the English rule is not very full, it can hardly be that all the aspects were not placed before the learned Judges by the eminent counsel that appeared in it. In *Bichhia Lal* v. *Munshi Ram*[4] the provisions of section 264 have been held to enact only a species of estoppel by holding out, in which view, a dormant partner would not be liable for subsequent dealings. In this state of the authorities, we venture to think that there is not much to be said for the rather too literal construction of the words of the section which the learned Judges in this case have adopted.

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3. (1915) 17 Bom. L. R. 762.
4. A. I. R. 1922 Lah. 466.
9. (1886) I. L. R. 9 Mad. 492.

VELLAIYAPPA CHETTY *v.* NATARAJAN, I. L. R. 55 Mad. 1: 61 M. L. J. 522 (P. C.).

In this case their Lordships examine the theoretical basis of the claim of an illegitimate son of a Sudra for maintenance and maintain that claim as against the joint family estate of his putative father and the collaterals after the death of the former. That the provisions of Mitakshara in Chapter I, section 12 which provide for succession of the illegitimate son of a Sudra and for maintenance in the other cases, is confined to property to which the son succeeds, and that it does not extend to joint family estate of the father with collaterals, was not contested, before their Lordships. The provision for maintenance therein besides is only as regards the illegitimate sons of the three higher classes. Even so their Lordships hold that the illegitimate son is a member of the family as recognised in S. 12 of the Mitakshara and by the Privy Council in *J. B. Hurrochundra Mahapatra* v. *N. Man Sing*[1] and that the general principle of Hindu Law is that a member of the family who is excluded from a share is entitled to maintenance and that accordingly the illegitimate son is entitled to maintenance against the joint estate from which he is prevented from taking a share. The assimilation of the position of the illegitimate son to that of widows and other disqualified heirs led inevitably to the further conclusion that not only future but also past maintenance could be awarded, and that it could be charged on the joint estate and finally that it is not confined to the period of the illegitimate son's minority, but extended to the whole life. In *Ranoji* v. *Kandoji*[2] Mr. Justice Muthuswami Aiyar had expressed the opinion that the share was in lieu of maintenance rather than the maintenance being in lieu of a share. That was before 18 C. 151 (*J. B. Hurrochundra Mahapatra* v. *N. Man Singh*) where the Privy Council recognised the status of an illegitimate son as a member of the family entitled to take by survivorship the share of the legitimate son. This ruling will not, however, apply to illegitimate sons generally, that is to say, for instance, children of adulterous union. Their case must stand on a different footing.

1. (1890) L. R. 17 I. A. 128: I. L. R. 18 C. 151 (P. C.).
2. (1885) I. L R. 8 M. 557.

LOUIS DREYFUS & CO. *v.* ARUNACHALA AYYA, I. L. R. 55 Mad. 93: 61 M. L. J. 623 (P. C.).

The judgment from which this appeal arose is reported in 27 L. W. 267. Numerous important questions arose in the case and were considered by the Appellate Court. The first question was whether an arbitration clause in a Dubash agreement entered into by one of the partners bound the other partners. Mr. Justice Waller held that as the arbitration clause was a usual form of Dubash agreement, it was within the competency of the partner. The Appellate Court held that Dubash agreement with arbitration clause was not a necessary incident of the trade which the partnership was carrying on. Their Lordships do not decide the question but hold that the four contracts in question adopt the arbitration clause and therefore apart from the Dubash agreement, the clause was binding by reason of its incorporation in the contract.

The second point was one of *res judicata*. On appeal from the order of the first Court, setting aside the award, the Appellate Court remitted the award without expressing any final opinion as to the binding nature of the agreement to refer. The question was whether in these circumstances the validity of the agreement of reference was *res judicata*. The Appellate Court held that as there was no decision on the question by the Appellate Court, the matter being apparently reserved for consideration after the return of the award, it was not *res judicata*. The Privy Council held that the matter was *res judicata* as whatever the reason of the judgment the remission could have been done only on the footing that the respondent was bound by the submission to arbitration.

The further question was whether taking independent legal advice on an important question of law involved in the case constituted misconduct on the part of the arbitrator. The Appellate Court held it was. Their Lordships hold otherwise, observing "the precise length to which an arbitrator may go in seeking advice upon matters of law may be difficult to prescribe in general terms . . . In their Lordships' judgment, the language of the award does no more than indicate that the umpire took advice upon the general rules of law bearing upon the case and does not mean that he left to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon. The case is not strengthened because the umpire in the exercise of his discretion refused to state a special case."

HARIDAS BASU *v.* NATIONAL INSURANCE COMPANY, LIMITED, I. L. R. 59 Cal. 199.

In this case, the learned Judges have held following the leading case of *Begg, Dunlop & Co.* v. *Jagannath Marwari*[1] that a simple contract debt due by a person resident outside the executing Court's jurisdiction cannot be attached or sold by that court and that such a sale will not confer any right to the debt on the purchaser. The question about the *situs* of a debt was discussed very fully by Sir Asutosh Mookerjee, J., in *Begg, Dunlop & Co.* v. *Jagannath Marwari*[1] with reference mainly to American authorities and the learned Judge came to the conclusion that a contract debt is situated in the place of the residence of the debtor. It may be noticed here that the question was not till recently free from doubt in England though it was laid down as early as the reign of Queen Elizabeth in *Byron* v. *Byron*,[2] a case of administration of the estate of a deceased person, that in the case of a specialty, the debt is where the bond is and in the case of other contracts, the debt followed the debtor. The same view has been followed in cases of probate and succession duty in *Commissioner of Stamps* v. *Hope*[3] and *Rex* v. *Lovitt*.[4] But when we come to other branches of law, as for instance, under the English Stamp Act, the decisions before 1931 were to the effect that a debt had no local situation. The English Stamp Act exempts from *ad valorem* duty agreements for the sale of property situate outside the United Kingdom and the question was whether debts due by persons resident outside fell within the exemption and it was held by the English Court of Appeal, in *Velasquez, Limited* v. *Inland Revenue Commissioners*,[5] *Smelting Company of Australia* v. *Commissioners of Inland Revenue*[6] and *Danubian Sugar Factories* v. *Inland Revenue Commissioners*[7] that though they answered the description of property they were not situated outside the United Kingdom on the ground that debts had no local situation and the cases of probate and succession duty were distinguished as based on the inability of local courts to administer assets where the debtors were resident outside the jurisdiction. In the recent case of *English Scottish and Aus-*

1. (1911) I. L. R. 39 C. 104.
2. (1596) 1 Croke Eliz. 472.
3. (1891) A. C. 476 at 481, 482.
4. (1912) A. C. 212.
5. (1914) 3 K. B. 458.
6. (1897) 1 Q. B. 175.
7. (1901) 1 K. B. 245.

tralian Bank, Ltd. v. *Inland Revenue Commissioners*[1] the whole question came under review before the House of Lords and their Lordships have held, overruling the decisions of the Court of Appeal referred to above, that simple contract debts being property have a local habitation, though only notionally and that their situation is the place of residence of the debtor and that it is a general principle running through all branches of law and not merely restricted to probate or succession duty. If this general principle is recognised, the circumstance that the debt is repayable in some other place than the residence of the debtor will make no difference and the *situs* of the debt will still be the place of residence of the debtor, as pointed out by the learned Judges in the present case.

It remains to notice only one other point decided in this case, namely, that the word "may" in S. 39 (1) of the Civil Procedure Code ought not to be understood as implying a mere discretion in the court which passed the decree but as having the force of "shall" when the conditions specified in the section exist. There does not seem to be any previous decision to that effect; but it is a well-recognised rule of construction, the conditions under which it can be invoked have been pointed out by the House of Lords in the leading case of *Julius* v. *Lord Bishop of Oxford.*[2] See also Maxwell's Interpretation of Statutes, 7th edition, pp. 210 *et seq.*

PRABASHINEE DEBI *v.* RASIKLAL BANERJI, I. L. R. 59 Cal. 297.

In this case, the rents due from certain tenants were transferred by the landlord when a suit by him for the same was pending and the transferee sought to execute the decree under O. 21, R. 16 after the decree was passed in the suit, on foot of the transfer of the rents to him and the learned Judges have held that he could not do so, following the decision in *Mathurapore Zamindary Co., Ltd.* v. *Bhasaram Mandal*[3] rather than *Ananda Mohon Roy* v. *Promotha Nath Ganguli*[4]. It might have been better if the question had been referred to a Full Bench to put an end to the conflict.

It must be noticed, at the outset, that in the earlier decisions which have been followed, the Judges that took part regretted

1. (1932) A. C. 238.
2. (1880) 5 A. C. 214.
3. (1924) I. L. R. 51 Cal. 703.
4. (1920) 25 C. W. N. 863.

the conclusion which they thought they were compelled to arrive at on the language of the statute. See *Bhandari* v. *Ramachandra*[1] and *Thakuri Gope* v. *Mokhtar Ahmad*,[2] especially the judgment of Bucknill, J., in the latter case. While thus learned Judges have felt that it is a case of hardship and they have not been able to do justice as they conceived it, it may not be inappropriate to examine the matter somewhat closely.

If in the case under notice, the instrument of transfer had purported specifically to assign the decree which may be passed thereafter in the suit whether, even then, the learned Judges would have come to the same conclusion is not clear. It would, however, seem that on the view of the learned Judges that there should be a decree in existence before it could be transferred, the decision would have been the same, even if the instrument provided specifically as above.

We, however, venture to think that these hardships could have been avoided if the expression "by operation of law" in O. 21, R. 16 is properly understood and given its full scope by including within it equity as well. To a lawyer, as distinguished from the layman's use of the word, "equity" does not mean something divorced from law but only a branch of law which was formerly administered in England by a different set of courts but which is now administered there by all courts after the Judicature Acts. Indeed, this nature of equity will be evident from any definition of the word in the leading text-books. See, for instance, Halsbury's Laws of England, Vol. 13, page 4, where it has been defined as the system of *law* which prior to the fusion of law and equity effected by the Judicature Acts, 1873 and 1875, was administered in the Courts of Chancery. In this country there is no basis even for this historical distinction. If, therefore, equity is really a branch of law, there can be no difficulty in bringing cases where future property, such as decrees to be passed hereafter, is transferred within the meaning of the expression "by operation of law". With all respect, it is difficult to see what warrant there is for restricting the word "law" in O. 21, R. 16 of the Civil Procedure Code to signify the law of succession, insolvency or statute law alone as has been done in some of the cases. Cf. *Mathurapore Zamindary Co., Ltd.* v. *Bhasaram Mandal*[3] and *Abdul Kader* v. *Daw Yin*.[4]

1. (1906) 17 M. L. J. 391.
2. A. I. R. 1922 Pat. 563.
3. (1924) I.L.R. 51 C. 703 at 708.
4. A. I. R. 1930 Rang. 308 at 310.

The effect in equity of the transfer of property not in existence, such as a decree that may be passed in the future may be noticed here. Such a transfer operates as an agreement to transfer the decree when passed; and as soon as the decree is passed, equity acting on the principle that equity considers that as done which ought to be done, treats the decree as transferred to the person to whom it ought to be transferred. See *Collyer* v. *Isaacs*,[1] per Jessel, M.R. This principle is well recognised in England from early times. See *Holroyd* v. *Marshall*[2] and *Tailby* v. *The Official Receiver*[3] and Halsbury's Laws of England, Vol. 13, pp. 74 and 104. That the rule is not restricted to any species of property is clear from the decision of the House of Lords in *Tailby* v. *The Official Receiver*.[3]

This rule has been followed in this country in the case of decrees to be passed in future in *Palaniappa* v. *Lakshmanan*[4] by Muttusami Ayyar and Wilkinson, JJ., and no good reasons are given in *Bhandari* v. *Ramachandra*[5] for not following it unless the reason is that equity is not law which, we submit, is not correct. It is not also clear how the use of the word "decree-holder" in O. 21, R. 16 militates against the view adopted in *Palaniappa* v. *Lakshmanan*.[4] This view has also been taken in Bombay by Sir Charles Sargent, C. J., and Bayley, J., in *Purmanand Das Jiwandas* v. *Vallabdas Wallji*,[6] which so far as we are able to see has not been dissented from by that High Court. Further, there seems to be no justification to restrict the application of this rule of equity to certain specified classes of cases alone, such as trustees and *cestui que trust*, as suggested in *Abdul Kader* v. *Daw Yin*,[7] where the learned Judges seem to recognise that their observations on this question are wholly *obiter*. We, therefore, venture to submit that the view which found favour in *Purmanand Das Jiwandas* v. *Vallabdas Wallji*,[6] *Ananda Mohon Roy* v. *Promotha Nath Ganguli*[8] and *Palaniappa* v. *Lakshmanan*[4] is more in consonance with justice and principle.

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1. (1881) 19 Ch. D. 342 at 351.
2. (1862) 10 H. L. C. 191.
3. (1888) 13 A. C. 523.
4. (1892) I. L. R. 16 Mad. 429.
5. (1906) 17 M. L. J. 391.
6. (1887) I. L. R. 11 B. 506.
7. A. I. R. 1930 Rang. 308.
8. (1920) 25 C. W. N. 863.

MUHAMMADI *v.* MUNICIPAL BOARD, AGRA, I. L. R. 54 All. 1.
EMPEROR *v.* PUTTU LAL, I. L. R. 54 All. 5.

These are interesting cases more for the attitude adopted by the Court in the interpretation of the rules concerned than the particular points decided. In the first, the question was whether the provision of the Municipal Act which authorised the Municipal Board to make bye-laws prohibiting prostitutes from residing in a specified area within the municipal limits justified its making a bye-law requiring the prostitutes to reside in a particular area and it was held having regard to the principle that statutes that encroach on private rights should be strictly construed that such a restriction was not justified. If instead of restricting them to a particular area, the bye-law had prohibited them from residing in the bulk of the municipal area, the Board might have been formally correct and then the question would have been as to whether it was a reasonable exercise of the rule-making power. It is somewhat difficult to believe that the validity of a particular Act should depend on shades of language which do not involve any difference in principle. In determining the question whether the exercise of the power was reasonable, probably the fact that the Act has not for its object segregation with a view to proper control or regulation but only the keeping of specified parts free from contamination possibly owing to special features connected with those parts may be a very valuable factor for consideration.

In the second case the question was whether the prohibition in a liquor shop licence against keeping the shop open at specified hours amounted to a prohibition of keeping it closed during the other hours. It was held that it did not and the conclusion seems obvious. But the Lower Court had convicted the man for breach of the conditions of the licence. The Magistrate had inferred that it was not a case of a temporary absence from the fact that there was picketing that day but that the closing was induced by the picketing. His Lordship the acting Chief Justice did not consider that circumstance material as he held that the condition did not amount to a prohibition of closing the shop at other hours in the absence of clear words to that effect.

MUNICIPAL BOARD, BENARES *v.* KANHAIYA LAL, I. L. R. 54 All. 6.

The point in this case was as to the powers of the Second Appellate Court in deciding questions of custom. After some conflict of opinion, the Madras High Court in a Full Bench decision in *Kumarappa Reddi* v. *Manavala Goundan*[1] decided that the High Court was bound by the findings as to the truth of the particular instances but the question as to whether the finding as to the existence and validity of custom was correct was a question of law which the High Court could consider. The Privy Council in *Mohesh Chunder Dhal* v. *Satrughan Dhal*[2], *Rup Chand* v. *Jambu Prasad*[3] and *Anant Singh* v. *Durga Singh*[4] has characterised the finding as to custom as a finding of fact while in *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi*[5] the same tribunal would seem to regard the questions as generally mixed questions of law and fact, "the Judge first finding what were the things actually done in alleged pursuance of the custom, then determining whether these facts found satisfy the requirements of law." This would seem to accord with the line of cases which hold that legal inference from established facts is a point of law, *e. g.*, permanent tenancy (*Nafar Chandra Pal Chowdhury* v. *Shukur Sheikh*[6] and *Dhanna Mal* v. *Moti Sagar*[7]), acquiescence (*Beni Ram* v. *Kundan Lal*[8]) and adverse possession (*Lachmeswar Singh* v. *Manowar Hossein*[9]). The view of the Full Bench in this case that the existence of the alleged practice is a question of fact does not seem to go further. Whether the number of instances given are sufficient for drawing the inference of custom, whether the departures are such as to detract from the uniformity or continuity that is required, whether the length of time during which the alleged practice has existed is sufficient

1. (1916) I. L. R. 41 M. 374: 34 M. L. J. 104 (F. B.).
2. (1902) L. R. 29 I. A. 62: I. L. R. 29 C. 343 (P. C).
3. (1910) L. R. 37 I. A. 93: I. L. R. 32 A. 247: 20 M. L. J. 439 (P. C.).
4. (1910) L. R. 37 I. A. 191: I. L. R. 32 A. 363: 20 M. L. J. 604 (P. C.).
5. (1917) L. R. 44 I. A. 147: I. L. R. 40 M. 709: 33 M. L. J. 1 (P. C.).
6. (1918) L. R. 45 I. A. 183: I. L. R. 46 C. 189 (P. C.).
7. (1927) L.R. 54 I.A. 178: I.L.R. 8 Lah. 573: 52 M.L.J. 663 (P. C.).
8. (1899) L. R. 26 I. A. 58 : I. L. R. 21 A. 496 (P. C.).
9. (1891) L. R. 19 I. A. 48: I. L. R. 19 C. 253 (P. C.).

to constitute the usage "ancient" within the meaning of the rule as to custom and whether the individual cases are cases in which the persons acting acted under the consciousness that the custom was binding, which so much weigh in the ultimate finding as to custom, even in the "practice" aspect of it being admittedly questions of law, the mere finding as to the existence of a practice amounts to no more than saying that there have been so many general instances of acting in pursuance of the alleged custom.

GHULAM MUHAMMAD *v.* GHULAM HUSSAIN, L. R. 59 I. A. 74: I. L. R. 54 All. 93: 62 M. L. J. 371 (P. C.).

Some observations *incuria* of the Privy Council in *Maung Tun Tha* v. *Ma Thit*[1] led to a considerable flutter in the Indian Courts as to the applicability of Art. 123 of the Limitation Act. Their Lordships finally declare in this case that that case does not affect the line of authorities which hold that that article only applies where the suit is brought against an executor or administrator or some person legally charged with the duty of distributing the estate thus affirming the view taken in *Nurdin Najbudin* v. *Bu Umrao*[2] and *Rustam Khan* v. *Janki*[3]. Somehow the bearing of *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao*[4] on this question is not considered where Art. 123 was applied to a claim of legacy against an executor *de son tort* who cannot be said to be a person legally charged with the duty of distributing the estate.

The further questions that arose in the case were points of Muhammadan law. A testator had devised to one of his sons as "proprietor" a portion of his estate subject to the trust of maintaining the slaves and dependents of the family and after the death of the testator the mother acting on behalf of that son and another son who were both minors had entered into an arrangement with daughters and other heirs by which the latter surrendered their rights under the Muhammadan law for certain consideration recognising also the devise. The High Court held that it was a family arrangement and bound the sons *inter se*. The High Court also held that the devisee had no beneficial interest given to

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1. (1916) L. R. 44 I. A. 42: I. L. R. 44 C. 379: 32 M. L. J. 71 (P. C.).
2. (1920) I L.R. 45 Bom. 519. 3. (1928) I.L.R. 51 A. 101 (F. B.).
4. (1925) L. R. 52 I. A. 214: I. L. R. 48 M. 312: 48 M. L. J. 627 (P. C.).

himself and as such the devise though to one of the heirs was good. Their Lordships dissented from both these conclusions and held that the devise was only subject to a charge or trust and did not exclude all beneficial interest in the son—that the devise in favour of the son was bad to the extent of that beneficial interest in the absence of consent on the part of the other heirs, that the alleged family arrangement did not bind the sons as the mother had no authority to act on their behalf under the Muhammadan law and also because the arrangement did not determine the rights of the brothers *inter se* and that in those circumstances fact that the devise did not bind the sons did not have the effect of re-opening the arrangement so far as the other heirs were concerned. It was suggested before their Lordships that it was a wakf, servants and dependents being proper objects of a wakf. Their Lordships overrule the contention holding that servants and dependents were not within the Wakf Validating Act and that there cannot be a wakf for them in the absence of ultimate dedication to the poor.

BALKISHEN DAS *v.* BECHAN PANDEY, I. L. R. 54 All. 68.

The point involved in this case is one on which there is distinct cleavage of opinion between the Madras High Court on one side and the High Courts of Calcutta and Allahabad on the other, viz., as to when a sale deed has been executed by the vendor and put into the hands of the vendee and the vendee could have used the provisions of the Registration Act to get the deed registered, whether it is open to him to sue for specific performance and to have another deed executed and registered. The Calcutta and Allahabad High Courts hold that he can so sue; the Madras High Court holds that he cannot. According to the latter Courts, the only mode of getting the document registered is that provided by the Registration Act and the remedy of specific performance is not available. In *James Skinner* v. *R. H. Skinner*[1] the Privy Council overrule the decision of the Calcutta Court to this extent, viz., that the unregistered sale deed could not be used to prove the agreement in a suit for specific performance. The other question as to whether a suit for specific performance will lie has not been considered by the Privy Council. In the case under review there was a suit under S. 77 of the Registration Act but unfortunately the Court passed a wrong order directing the defendant to present the document for registration instead of permitting the plaintiff to present it for registration. Whether the peculiar features of the case would have made any difference in Madras is doubtful, for even so, the duty of the plaintiff was to get the decree set right in appeal.

SHIB DAS *v.* NAND LAL, I. L. R. 13 Lah. 178.

The soundness of this decision is open to doubt. The mother of a Hindu who succeeded to his property as his heir made a gift in favour of her daughter's son. The agnates of the fourth degree who were the then presumptive reversioners filed a suit for a declaration that the gift is invalid and not binding on the reversion and the Lower Court granted it accordingly. The donee appealed but before the appeal was heard, Act II of 1929 came into force. The learned Judges hold that the donee, as a sister's son of the last male owner, is a preferential heir to the deceased as he now comes earlier in the order of

1. (1929) L. R. 56 I. A. 363; I. L. R. 51 A. 771; 57 M. L. J. 765 (P. C.).

succession than the plaintiffs and the suit must accordingly fail. The latter conclusion however does not follow from the former. The donee, if he survives the widow, may exclude the plaintiffs under the new Act. But as the widow was still alive and as the succession has not opened, it cannot be assumed that the declaration would be futile. If the donee does not as a matter of fact survive the widow when the reversion actually opens, the heirs of the donee will have to surrender the property to the actual reversioners. Nor can it be suggested that the suit cannot be laid by the remoter reversioners, as on the facts it is clear that the nearest reversioner has precluded himself from suing on behalf of the reversion. In such circumstances the more remote reversioner can institute the suit on behalf of the reversionary estate. *Jhandu* v. *Tarif*,[1] *Rani Anund Koer* v. *The Court of Wards*.[2] It does not appear from the report whether the gift was of the whole estate of the last male owner, so as to let in the doctrine of surrender but even if it were so, the donee was not the next reversioner at the time of the gift in question and the particular gift therefore cannot be treated as a valid surrender. It may be that the widow and the donee may be able, in the altered state of the law, to enter into a fresh transaction defeating the rights of the reversioners but that cannot justify the conclusion that the suit as brought must fail.

It may also be noted that the Act does not say, in clear terms, that S. 2 will apply even to cases where the male owner, whose heirship is being regulated, died before the Act comes into force. It is true that there is no saving clause in favour of existing succession to estates of males who died earlier. It is therefore permissible to hold that, whenever after the coming into force of the new Act, the order of succession has to be decided, S. 2 thereof will apply. The expression "Hindu male dying intestate" in the preamble of the Act is, however, somewhat ambiguous. Where however the operative portion of the enactment is clear, the preamble cannot be relied on to curtail it. See *Secretary of State for India in Council* v. *Maharajah of Bobbili*.[3] *Attorney-General* v. *Brodie*.[4]

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1. (1914) I. L. R. 37 All. 45: 28 M. L. J. 453 (P.C.).
2. (1880) L. R. 8 I. A. 14: I. L. R. 6 Cal. 764 (P.C.).
3. (1919) L.R. 46 I.A. 302: I.L.R. 43 Mad. 529 at 536: 37 M.L.J. J. 724 (P.C.)
4. (1846) 4 M. I. A. 190.

MUSSAMMUT AFZAL-UN-NISSA *v.* FAYAZUDDIN, I. L. R. 13 Lah. 195.

The procedure of allowing numerous parties having a common interest to be represented by some of them for the purpose of a pending litigation is well established on general principles of convenience and necessity. O. 1, R. 8, Civil Procedure Code, provides for the matter in the trial court. There is nothing wrong or objectionable in allowing a similar principle in later stages like appeals. The mere existence of a decree in favour of several persons is not necessarily a bar to the exercise of such power by an appellate court in proper cases. We agree that S. 107 and S. 151, Civil Procedure Code, are of sufficient amplitude to justify such a procedure in an appeal also.

MUSSAMMAT MOTI BAI *v.* THE AGENT, NORTH-WESTERN RAILWAY, I. L. R. 13 Lah. 228.

The question in this case was whether the expression "unmarried sister" in the definition of the term "Dependent" in Act VIII of 1923 (The Workmen's Compensation Act) includes a sister whose husband is not alive at the time when the question arises. The learned Judge holds on the English authorities cited that the primary meaning of the term is no doubt a person who has *never* been married but that the secondary meaning is also possible if the context and circumstances indicate the same. Having regard to the policy of the Indian Act it was held in the above case that the expression "unmarried" was satisfied by the fact that the claimant had no husband alive at the time. We do not think that there is sufficient indication in the Act or the context to justify any other than the primary meaning of the term. No doubt actual dependence is not a condition precedent under the Indian law. But that circumstance is not by itself conclusive. If actual dependence is no criterion, there is no reason why a married adult daughter should be excluded while a widowed sister should be included. The expression "unmarried" in reference to the daughter is obviously used in the primary sense only and there is no reason why the same term in the same definition clause should have a wider significance in the case of a sister.

KIRPA RAM *v.* MUHAMMAD ZAHUR DIN, I. L. R. 13 Lah. 311.

A decree directing delivery of possession to the plaintiffs conditionally on their paying the defendants a certain sum of money was never executed. The defendants who had all along been denying the title of the plaintiffs held on for more than twelve years after the decree. The learned Judges held that the defendants were in adverse possession and perfected their title. The decree cannot be construed as creating the relationship of mortgagor and mortgagee nor that of landlord and tenant.

The defendants' possession for over 12 years after the passing of an unconditional decree for possession in favour of the plaintiff which was never executed has been held to create a statutory title. *Maharaja-Bahadur Kesho Prasad Singh* v. *Madho Prasad Singh*.[1] Similarly the Privy Council has held that a decree which provided for the defendants continuing to own their rights as jotedars so long as they were ready and willing to pay specified rent to the plaintiff could not be read as establishing the relationship of landlord and tenant between the parties and that the continued possession of the lands by the defendants without payment of rent for over the statutory period was sufficient to bar the plaintiff's claim. *Kumar Gopika Raman Roy* v. *Atal Singh*.[2] This latter decision of the Privy Council will directly govern the case under notice.

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1. (1928) 55 M. L. J. 251 (P.C.)
2. (1929) L. R. 56 I. A. 119: I. L. R. 56 C. 1003: 56 M.L.J. 562 (P.C.)

IMPERIAL BANK OF INDIA *v.* BENGAL NATIONAL BANK, I. L. R. 59 Cal. 377 : 61 M. L. J. 589 (P. C.).

The decision in this case is one of considerable interest and importance as their Lordships have themselves observed. Stripped of details immaterial for the present purpose, the facts are that a Bank which had outstandings due from customers for which securities of immovable properties had been taken by deposit of title deeds assigned the outstandings to another Bank by two unregistered documents and the question was about the rights of the assignee Bank. The matter was somewhat complicated by an admission made on a former occasion that by reason of non-registration of the documents, *i. e.*, the debentures in the particular case, the immovable properties could not be affected. It is not clear what the decision would have been with respect to the immovable properties given as security but for the admission referred to.

One point is however made quite clear by their Lordships, namely, that in the cases of mortgage debts and debts which are otherwise charged on immovable properties, the debts remain distinct and are not merged in the immovable properties which are given as securities and do not become immovable properties for that reason. The result is, as their Lordships have pointed out, that the debts can be the subject of transfer apart from the immovable properties secured which securities themselves can only be transferred by act of parties only by a registered instrument under the Transfer of Property Act, as they are an interest in immovable properties. Their Lordships have also pointed out that the exclusion of mortgage debts from the definition of an "actionable claim" in S. 3 of the Transfer of Property Act as amended by Act II of 1900 has not the effect of making the debts, apart from the immovable property given as security, not transferable otherwise than by a registered instrument. The result of this pronouncement would seem to be that the decisions in *Perumal Ammal* v. *Perumal Naicker*[1], *Elumalai Chetty* v. *Balakrishna Mudaliar*[2] and *Sakhiuddin Saha* v. *Sonaullah Sarkar*[3] to the extent to which they hold that, after the amendment, a mortgage debt can only be transferred by a registered instrument even with

1. (1920) I. L. R. 44 M. 196 : 40 M. L. J. 25.
2. (1921) I. L. R. 44 M. 965 : 41 M. L. J. 297.
3. (1918) 22 C. W. N. 641.

regard to the debt are no longer good law. Indeed, their Lordships have pointed out that such a debt though not an actionable claim under the Act is nevertheless a debt and that therefore the provisions of S. 134 which refer to debts and not to actionable claims, are applicable to such a case.

In view of their Lordships' decision, it may be noticed that the effect of the amendment is only that mortgage debts are excluded from the definition of the expression "actionable claims" wherever that expression is used in the Transfer of Property Act, but that nevertheless they are debts which are a species of property which are not prohibited from alienation by reason of S. 6 of the Act but which, on the other hand, are expressly made alienable by that section. If, therefore, they are debts and can be alienated under the provisions of S. 6 and they are not "actionable claims" to which the formalities for a transfer prescribed by S. 130 do not apply, it would seem that the debts can be transferred even orally. *See* S. 9 of the Transfer of Property Act. If, as has been pointed out, the debts, as such, could be transferred, the effect of such transfer would be that under S. 8 of the Transfer of Property Act, the security would also be transferred by operation of law. Cf. the principle underlying *Cuniah* v. *Gopal Chettiar*[4] and *Nataraja Iyer* v. *The South Indian Bank of Tinnevelly*[5], *Dwarkadoss Govardandoss* v. *Devakoti Ammal*[6] and *Perumal Ammal* v. *Perumal Naicker*[1]. It may be that this aspect of the matter was not open before their Lordships by reason of the admission that the documents in the case required registration and not being registered would not affect any immovable properties.

It remains to notice what their Lordships seem to think is the consequence of the amendment. They observe that its effect is to restrict the statutory rights on transfer, such as the right to sue in the transferee's name, etc., to such transfers as are transfers of "actionable claims" as defined. Their Lordships further observe that the assignee bank can only enforce the debt in the name of the assignor bank which no doubt the latter must permit. While no exception can be taken to the previous statement which we understand as meaning that the

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1. (1920) I. L. R. 44 M. 196 at 201: 40 M. L. J. 25.
4. (1918) 1919 M. W. N. 613 : 26 M. L. T. 242.
5. (1911) I. L. R. 37 M. 51 : 22 M. L. J. 105.
6. (1914) 15 M. L. T. 198.

provisions relating to "actionable claims" in the Act do not apply to a transfer of the debts in mortgage debts, it is not easy to appreciate the force of the latter observation. Once it is recognised that the debts, as such, are transferable under S. 6 of the Act, it is difficult to see the necessity of the transferor joining in the suit on the debts. Even in England, this necessity of the transferor joining in the suit was restricted to cases of legal choses in action which were not assignable at Common Law but whose assignment was recognised only in equity. The rule has no application to cases of equitable choses in action, such as, the right to recover a legacy or the interest in a trust fund, which were assignable in equity and to the cases of choses in action falling under S. 25 (6) of the Judicature Act of 1873 which is now re-enacted in S. 136 of the English Law of Property Act, 1925. If, therefore, in the cases of choses in action assignable at law or by statute, there was no need to join the transferor in the suit, there seems to be no necessity in this country even after S. 6 of the Transfer of Property Act to join the transferor in the suit on the debt.

JATEENDRAMOHAN MITRA *v.* PRABODHKUMAR DATTA, I. L. R. 59 Cal. 260.

One of the points laid down in this case is that even when one of the walls of a room belongs to the defendant and there is a window in that wall, the plaintiff who owns the room and the other three walls enclosing the room can acquire a right of easement of light by prescription through the window belonging to the defendant and in his wall and opening on his premises. To put it shortly, the learned Judges have held that the plaintiff can acquire an easement of light through the defendant's window for the plaintiff's premises. The decision itself has been given under S. 26 of the Indian Limitation Act as the Indian Easements Act does not extend, among other provinces, to Bengal. But the point will, we venture to submit, have to be answered in the same manner under the latter Act as well, as the terms of S. 15 of the Indian Easements Act are, for the present purpose, similar to those of S. 26 of the Limitation Act.

The confusion which led to the argument for the opposite view is based on the use of the expression "plaintiff's ancient lights" and understanding it as meaning "plaintiff's ancient

windows" which would imply that the windows themselves should be owned by the plaintiff. If, as pointed out in Goddard on Easements of the 7th edition, page 54, the expression used is "ancient light" and not "ancient window" and the latter phrase is nowhere used, it will be recognised that there is very little to support the argument. Further, as shown by the same author, the plaintiff's "right to light," as it is sometimes called, means really the curtailment of the neighbour defendant's right to build as he pleases or to refrain from building on his land in such a way as to hinder the access of light to the plaintiff's premises. This, indeed, is the true nature of an easement and is adopted in the definition of the term in S. 4 of the Indian Easements Act and has been elaborated in S. 7. *See*, especially, Illustration (*a*) to S. 7. In this view, a servient owner is prevented from building on his land so as to obstruct the access of light to the dominant heritage and it is immaterial if the aperture or window in respect of which the right is claimed and which in some respects is the measure of his right belongs to the defendant himself. It must, however, be noticed that the decisions in *National Provincial Plate Glass Insurance Company* v. *Prudential Assurance Company*[1] and *Scott* v. *Pape*,[2] referred to by the learned Judges in the case under notice, have been shaken to some extent by the decision of the House of Lords in *Colls* v. *Home and Colonial Stores, Limited*,[3] though it may not strictly affect the present question. The point is clear if the language of the statute is given effect to, as the learned Judges have done, without trying to import considerations and notions foreign to the sections within their scope.

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1. (1877) 6 Ch. D. 757. 2. (1886) 31 Ch. D. 554.
3. (1904) A. C. 179.

MAHABIR SINGH *v.* DIP NARAIN TEWARI, I.L.R. 54 All. 25.

On the question as to how far the validity of a decree is open to examination in execution, that is to say either that it was rendered by a Court without jurisdiction territorial or otherwise, or that for any other reason it is a nullity there is a regular babel of decisions.

The judgment of Sir Sulaiman in this case strikes a hopeful mean which might afford a solution. The question here was as to whether it was open to the representative of a party who died before decree and whose representatives were not brought on record to show in execution that the decree was bad on that ground. The Officiating Chief Justice, with whom the other Judges of the Full Bench concurred, held that the question was not open in execution as the questions that can properly be investigated under S. 47, Civil Procedure Code, are questions relating to execution, satisfaction and discharge of the decree but not questions regarding the validity of the decree itself. His Lordship was also of opinion that the ancestor was not really a party within the meaning of the section, he having died before the decree just as a minor not properly represented has been held to be not a party. For that reason also His Lordship was of opinion that S. 47 did not apply.

Having held that he was not a representative it was easy to hold that the Court could pronounce that the decree was not binding against him while the decree was in execution though the order would not be an order under S. 47 but an order under O. 21, R. 58 or O. 21, R. 100 according to the stage at which the order is made.

His Lordship would apparently hold even in the case of parties that it is open to the Court to hold that the decree was a *nullity* though such order would not be conclusive but would be open to re-examination in a suit. If the decree was only voidable, the Court could not go into the question in execution but would have to leave it to be determined in a fresh suit. A further question discussed in connection with this matter was as to whether a party who defeated the application of the other side under S. 47 on the ground that it was not a matter for decision under that section but for a separate suit could defeat the suit subsequently brought by pleading S. 47 in bar of the suit. The Judges seem to be agreed that there would be no estoppel in the case as it would be against Statute to hold that

there was one. The rule of estoppel has been applied by the Privy Council in *Sadasiva Pillai* v. *Ramalinga Pillai*[1] so as to preclude a party who had agreed to payment of mesne profits being enforced in execution from afterwards resiling from the agreement and pleading that it was not a matter for execution. The ground assigned was that it was not a case of utter want of jurisdiction but of irregular procedure in respect of matters over which the Court has undoubted jurisdiction. This principle was applied so as to prevent the objection of S. 47, Civil Procedure Code, being taken in appeal in *Venkatakrishnama Charlu* v. *Krishna Rao*[2]. In other words, it was held that the objection not being one as to jurisdiction but one relating to procedure, it could be waived. This view has the support of numerous cases therein cited. In very similar circumstances to the present in *Jagannadha Rao* v. *Kurmayya*[3] it was held that the party was estopped. (See also *Ramgati Mohurer* v. *Pran Hari Seal*[4] and *Shashi Bhusan Mandal* v. *Ram Sebak Mandal*[5].) On this point, however, a dissenting note is struck in *Abdulla Koya* v. *Kallumpurath Kanaran*[6]. In *Sadasiva Pillai* v. *Ramalinga Pillai*[1] there was no question of contravening the provision of any statute, but having regard to the fact that it is open to the Court to convert the application under S. 47 into a suit so long as no question of jurisdiction as to subject-matter arises, the better conclusion would seem to be that the rule of estoppel might be given effect to. Another question that arose for consideration was as to whether the point of estoppel could be taken in appeal. Somewhat narrow view was taken of the admissibility of new points in appeal by the Full Bench in *Ram Kinkar Rai* v. *Tufani Ahir*[7]. The Chief Justice would confine the authority of that case to the question that directly arose in it, viz., as to whether the particular point raised in that case could be taken in appeal by a party. He suggests various circumstances among others considerations of public policy being one that might justify the entertainment of a new ground in appeal. His Lordship also points out that any way it is open to the Court itself in a proper case to raise the point in its discretion and determine it or have it determined. In *Ganga Ram* v. *Mutesra*[8], a case reported in this part,

1. (1875) L. R. 2 I. A. 219.
2. (1909) I. L. R. 32 M. 425.
3. (1907) 17 M. L. J. 314.
4. (1905) 3 C. L. J. 201.
5. (1914) 24 I. C. 181.
6. (1917) 33 M. L. J. 463.
7. (1930) I.L.R. 53 All. 65 (F.B.).
8. (1931) I. L. R. 54 All. 65.

a point of law arising on facts admitted—the point being an objection under O. 2, R. 2—it was held could be taken for the first time in appeal. This is what Lord Watson says in *Connecticut Fire Insurance Company* v. *Kavanagh*[9] with reference to this matter:

" When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

In *Ramlal Hargopal* v. *Kishanchand*[10] their Lordships felt bound "to take notice of an objection to the jurisdiction however late in the day it may be raised if it be that on the facts admitted or proved it is manifest there is a defect of jurisdiction". The plea of absence of jurisdiction will be entertained even though it was dropped in the lower appellate Court (*H. A. Brett* v. *Ellaiya*[11]) and was permitted to be raised by the Privy Council, though it was not raised in any of the Lower Courts and was not even mentioned in the grounds of appeal to the Privy Council. *Maha Prasad Singh* v. *Ramani Mohan Singh*[12] and *Bansilal Abirchand* v. *Ghulam Mahbub Khan*[13].

One other question that was considered was as to whether a suit on a mortgage can abate after the preliminary decree. The Allahabad High Court maintains the view taken in earlier cases that it can abate and dissents from the Madras view in *Perumal Pillai* v. *Perumal Chetty*[14].

RASHID AHMAD *v.* ANISA KHATUN, L. R. 59 I. A. 21 : I. L. R. 54 All. 46 : 62 M. L. J. 405 (P. C.).

This case is a warning to Muhammadan husbands who pronounce in thoughtlessness, anger, or for appearance sake and with ulterior motives talak in the triple form. Their Lord-

9. (1892) A. C. 473 at 480.
10. (1923) L. R. 51 I. A. 72: I. L. R. 51 C. 361: 46 M. L.J. 628 (P.C.).
11. (1869) 13 M. I. A 104.
12. (1914) L. R 41 I. A. 197: I. L. R. 42 C. 116: 27 M. L. J. 459 (P.C.).
13. (1925) L. R. 53 I. A. 58: I. L. R. 53 C. 88: 49 M. L. J. 806 (P.C.).
14. (1928) I. L. R. 51 M. 701: 55 M. L. J. 253 (F.B.).

ships hold that a person cannot get rid of the legal effect of the ceremony of talak by giving proof of his intention and showing that it was a fictitious act. The ceremony was gone through in this case, it was said, to please the father and the couple lived on in spite of it as husband and wife for fifteen years and had several children but to no effect. The law trifled with had its revenge and the wife was held to be no wife and the children illegitimate. Acknowledgment by the husband could not give them legal status in the absence of proof that the woman was married by another and divorced and then lived with the divorcing husband. Proof of living together as husband and wife was held by itself not sufficient to fill up the gap.

ALI MUHAMMAD KHAN *v.* ISHAQ ALI KHAN, I. L. R. 54 All. 57 (F. B.).

A plaint was filed in Court purporting to be by a minor, his mother acting as his next friend. He was a major at the time. The filing of the plaint, however, was with his knowledge and authority. The question was whether the defect could be remedied. The Full Bench holds that it is a mere irregularity and as such was not irremediable. The general trend of cases has been, as pointed out in this case, to regard all defects as to verification, signature, or presentation or authority as mere irregularities that are capable of being cured so long as the presentation has been with the knowledge and authority of the person concerned. Even if it has been without authority, there is nothing against the act being ratified so long at any rate as the other side is not deprived of the plea of limitation available to it.

NAND GOPAL *v.* BATUK PRASAD GUPTA, I. L. R. 54 All. 17.

The owner of two houses, while selling one of them with a construction on the intervening lane and in part resting on a wall of the other, reserved to himself the right to call upon the vendee at any time to remove the construction at his (vendee's) expense and keep the lane clear. The question in the case was whether this agreement could be enforced against the official assignee in whom the property vested on the insolvency of the vendee or his vendee. Their Lordships held that it could be. Whether viewed as a clause reserving an easement in favour of the vendor or as a covenant restricting the enjoyment by the purchaser for the beneficial enjoyment of the vendee's house (Ss. 11 and 40 of the Transfer of Property Act) or as a clause reserving an option to the vendor to revoke the easement in favour of the vendee (S. 39, Easements Act), there is no reason why it should not bind the official assignee or his vendees having regard to the principles laid down by the Privy Council with respect to the rights of the official assignee in *Sheobaran Singh* v. *Kulsum-un-nissa*[1]. The more difficult question was whether the clause amounted to any of these various things, or was a mere affirmative covenant which undoubtedly the clause relating to payment of costs was and which could not bind the purchaser (see *Smith* v. *Colbourne*[2], which somewhat resembles the case). In the determination of the precise nature of the agreement the ownership of the lane would have been a material circumstance but the report does not disclose any clue as to it. So far as the right to rest the construction on the wall of the unsold house was concerned the grant was of an easement and there does not seem to be any reason why the agreement should not be read as an option reserved which when exercised would terminate the easement (S. 39 of the Easements Act). If the lane also belonged to the vendor the position with respect to it would also be precisely the same. If it belonged to neither and both the vendor and the vendee had only an easement in respect of it the agreement would amount to an authority or licence to obstruct the enjoyment of the easement and 20 years' non-enjoyment might destroy the right under S. 47, the agreement notwithstanding—the agreement remaining alive thereafter merely for the purpose of giving a right of damages as against the actual party to the covenant or his representatives. Transferees would not be bound after the extinction of

1. (1927) L. R. 54 I. A. 204: I. L. R. 49 A. 367: 52 M. L. J. 658 (P. C.).
2. (1914) 2 Ch. 533.

the easement right. If the lane belonged to the vendee the agreement could be viewed as a covenant restricting enjoyment; then also, it would bind purchasers with notice which their Lordships held the purchaser in the case to be. The covenant in the case, however, seems to have been affirmatively expressed and would seem to be almost similar to that in *Smith* v. *Colbourne*[2] where the Court of Appeal held that it could not be read as implying a negative covenant restricting enjoyment. If the legal position should be considered as one of the creation of an easement in future it would be open to the vice of perpetuity. Gale on Easements, p. 8. If, on the other hand, it could be viewed as reservation of a present right of easement, it would not be open to any objection on that score (see *South Eastern Railway Company* v. *Associated Portland Cement Manufacturers, Ltd.*[3]) and non-exercise of that right might not extinguish the easement as the non-exercise would have been in pursuance of an agreement between the servient and dominant owners (S. 47, Easements Act, Explanation). A minor point as to notice also arose in the case. That is to say whether the registration of the deed of sale was notice to the purchaser of this reservation. As the reservation was not a transaction requiring registration the view of their Lordships that registration was notice does not seem to be correct but the same conclusion results from the application of the other well-known principle that notice of a deed is notice of its contents. It is impossible that the vendee from the Official Assignee should have been unaware of the sale deed which was the foundation of his title.

HANS NATH *v.* RAGHO PRASAD SINGH, L. R. 59 I. A. 138: I. L. R. 54 All. 189: 62 M. L. J. 544 (P. C.).

Pending a suit to enforce the customary right of pre-emption against the purchaser of a share in a village, the defendant acquired by gift from another co-sharer a small independent fractional share. If the gift had taken place before the suit that would have defeated the right of pre-emption. The question was whether the same thing taking place after suit defeated the right. *Per contra*, it was argued that the principle of *lis pendens* applied. Their Lordships point out that the principle of *lis pendens* renders the alienation of the subject-matter of the suit ineffective and could have no application to the present case where the defendant acquired some other share by gift. If,

2. (1914) 2 Ch. 533. 3. (1910) 1 Ch. 12 at 15.

for instance, a sale or gift of the share forming the subject-matter of the gift takes place in favour of a co-sharer during suit, it would not, by reason of the principle of *lis pendens*, defeat the right of pre-emption though if the same transaction took place before suit, it would have defeated it. Their Lordships would not give a wider application to the rule of *lis pendens* and expressly negative any general, doctrine of law that nothing occurring between the date of the suit and the decree could alter the relations between the parties. It was possible to hold that nothing that took place after the sale should affect the right of the co-sharer if the custom was that but that was not the custom as found by the Allahabad High Court. The custom as found disentitled the co-sharer to pre-empt if after sale or before suit (*i*) the co-sharer claiming pre-emption ceased to be such by partition, (*ii*) if the vendee became a co-sharer by any undisputed purchase or by a gift, and (*iii*) if the vendee transferred the property to another co-sharer. Their Lordships held that the principle of *lis pendens* is material only in case of the transfer of the subject-matter and not in other cases.

FAQIR CHAND *v.* AZIZ AHMAD, L. R. 59 I. A. 106: I. L. R. 54 All. 199: 62 M. L. J 492 (P.C.).

Properties *A* and *B* were mortgaged to *X* and then properties *B* and *C* were mortgaged to *Y*. In taking account of the value of *B* for the purpose of contribution is the whole amount of the mortgage to *X* to be taken into consideration or only the proportionate liability? This was the question before their Lordships in this case. Their Lordships overruling the opinion to the contrary of the Allahabad High Court held that it is only the proportionate liability that has to be taken account of and not the entire liability. The Allahabad High Court took the language literally and held that the amount of the incumbrance to which the property is subject could not be read as the proportionate amount to which it is by the application of the principle of the section liable. In arriving at this conclusion the High Court referred to the definition of the mortgage money in S. 58, and naturally this argument is not of much value as the word mortgage money does not occur in S. 82. The High Court held that the term incumbrance had a wider connotation than mortgage and would include even a permanent lease and as such did not attract the application of S. 82 in the assessment of its value. Their Lordships of the Privy Council while

agreeing that the word incumbrance has a wider connotation than mortgage, could not follow the High Court in the argument founded upon it. The section being one framed for the purpose of determining the ultimate liability, it would seem to be commonsense to read the section in the manner their Lordships have done. Their Lordships do not consider the changes effected in the section by recent legislative amendments but it does not seem that they effect any material change in this matter. The words substituted are " the amount of any mortgage or charge". The change takes the point from the argument of the Allahabad High Court by substituting the words "mortgage and charge" to both of which the principle of contribution enunciated in S. 82 is applicable. It would not, we apprehend, have the effect of preventing the Court from taking account of incumbrances such as permanent leases or attachments as those are factors to be considered in assessing the value of the mortgaged property. When the immoveable property mortgaged is subject to a permanent lease it is impossible to conceive how the mortgage can be held to comprise the leasehold right; the property comprised would only be the entire right minus the leasehold interest. In fact the direction as to deduction would seem to be totally unnecessary but for reducing the liability to the proportionate share of the prior mortgage amount. When the equity of redemption is mortgaged it is difficult to understand how the value of the property comprised in the mortgage could be arrived at without taking into account the prior mortgage. The provisions of the Transfer of Property Act do not keep the two ideas, viz., of physical property and the property comprised in the mortgage which might be a smaller right distinct and there is consequently a lot of confusion which it is to be regretted even the recent amendments have not entirely cleared though decisions of Courts have helped considerably to clarify the ideas on the subject.

Although their Lordships would not dismiss the suit for contribution on the ground of non-joinder of some of the parties who were liable to contribute the suit having been dismissed in the first Court also on the ground that no materials had been placed before that Court to enable it to arrive at a conclusion as to the value of those other properties comprised in the first mortgage their Lordships affirmed the order ofdismissal.

Their Lordships express no opinion on the important point of limitation considered in the first Court, viz., as to whether limitation for a suit for contribution under S. 82, Transfer of Property Act, arises from the date of payment or on the footing that the plaintiff is subrogated to the rights of the original mortgagee whom he has paid off, a point on which there is a sharp cleavage of opinion.

MAHOMED CHOTOO *v.* ABDUL HAMID KHAN, I. L. R. 10 Rang. 82.

A suit was brought by some of the heirs of a deceased Mahomedan for recovery of possession of their share in certain property belonging to the deceased in the hands of the defendant. The defendant had no right or title to, or to represent, the estate of the deceased but was in possession as a trespasser without any title. It was held in the case under notice that Art. 123 of the Limitation Act did not apply to the case. In the other High Courts it has been uniformly held that even if the defendant were not a trespasser but a co-heir, Art. 123 will not apply, as the co-heir in possession is not under any legal duty to distribute the estate between the other co-heirs. (See *Khadersa Hajee Bappu* v. *Puthen Veettil Ayissa Ummah*[1], *Umardaraz Ali Khan* v. *Wilayat Ali Khan*[2], *Mahomed Riasat Ali* v. *Hasin Banu*[3], *Nurdin Najbudin* v. *Bu Umrao*[4], *Mussammat Jano* v. *Narsingh Das*[5], *Rustam Khan* v. *Janki*[6], *Marian Beeviammal* v. *Kadir Meera Sahib Taragan*[7] and *Bai Jivi* v. *Bai Bibanboo*[8].) The question therefore of a trespasser defendant is in these Courts only *a fortiori*. *See* Mitra's Limitation, 6th ed., p. 1477, note (3). The cases cited as authority for the position were cases against strangers but the question was not discussed in them but assumed. *Kartick Chunder Ghuttuck* v. *Sundari Debi*[9] was one under Art. 127 and it has been held under that article in *Bhavrao* v. *Rakhmin*[10], *Malkappa* v. *Mudkappa*[11] and *Fakirappa* v. *Rudrappa*[12] that the plaintiff and defendant must both be members of a joint Hindu family. But in Rangoon it has been held almost consistently and in some cases the Court has even said that it is the settled and incontestable law that Art. 123 applies to a suit against a co-heir, unless after the succession opened, the co-heirs agreed to be in possession as tenants-in-common. See *Maung Po Kin* v. *Maung Shwe Bya*[13], *Ma Tok* v. *Ma Yin*[14] and *Maung Shwe An* v. *Maung Tok Pyu*[15]. In *Maung*

1. (1910) I. L. R. 34 M. 511 : 20 M. L. J. 288 (F. B.).
2. (1896) I. L. R. 19 All. 169.
3. (1893) L. R. 20 I. A. 155 : I. L. R. 21 Cal. 157 (P. C.).
4. (1920) I. L. R. 45 Bom. 519.
5. (1929) I. L. R. 11 Lah. 29.
6. (1928) I. L. R. 51 All. 101 (F. B.).
7. (1915) 29 I. C. 275.
8. (1928) 31 Bom. L. R. 199 : A. I. R. 1929 Bom. 141.
9. (1891) I. L. R. 18 Cal. 642.
10. (1898) I.L.R. 23 Bom. 137 (F.B.).
11. (1912) I. L. R. 37 Bom. 84.
12. (1931) 34 Bom. L. R. 354 : A. I. R. 1932 Bom. 255.
13. (1923) I. L. R. 1 Rang. 405.
14. (1925) I. L. R. 3 Rang. 77.
15. (1927) I. L. R. 5 Rang. 582.

Tun Tha v. *Ma Thit*[16] the Privy Council applied Art. 123 to the case of Buddhist co-heirs without discussion and that gave a stir to the settled views of the other High Courts on the question. (See *Shirinbai* v. *Ratanbai*[17].) But finally the Courts stuck to their view (*Nurdin Najbudin* v. *Bu Umrao*[4], *Rustam Khan* v *Janki*[6] and *Mussammat Jano* v. *Narsingh Das*[5]) and it is noteworthy that Rangoon also followed *Rustam Khan* v. *Janki*[6] in *Ma Bi* v. *Ma Khatoon*[18] in the case of Mahomedan co-heirs. The ground of distinction of *Maung Tun Tha* v. *Ma Thit*[16] suggested in these later cases, namely, that it is a case under the Buddhist Law, does not seem to be tenable though it was approved also in *Ma Bi* v. *Ma Khatoon*[18]. In fact in *Ma Nan Thu* v. *Ma Shwe Mi*[19] which is not referred to in *Ma Bi* v. *Ma Khatoon*[18] it was applied in Rangoon to a case of Christian co-heirs. Further *Maung Po Kin* v. *Maung Shwe Bya*[13] puts it on general principles and not as anything special to Buddhist Law. It was by virtue of *Maung Tun Tha* v. *Ma Thit*[16] to a certain extent that in *Rajah Parthasarathi Appa Rao* v. *Rajah Venkatadri Appa Rao*[20] Art. 123 was applied to the case of a defendant who was not an executor, but was in possession of the estate in circumstances which rendered him accountable in equity to those having claims upon the estate and inasmuch as in *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao*[21] the Privy Council have upheld the decision, it has to that extent received the imprimatur of the Judicial Committee. But now again in *Ghulam Mahammad* v. *Shaikh Ghulam Husain*[22] the Privy Council have definitely stated that the Board in *Maung Tun Tha* v. *Ma Thit*[16] did not intend to overrule the long series of decisions of Indian Courts and in fact that there no question of limitation arose. The question may, therefore, arise as to how *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao*[21] and *Ghulam Mahammad* v. *Shaikh Ghulam Husain*[22] can both be dovetailed to give a consistent interpretation to Art. 123. In *Rajah Parthasarathi Appa Rao*

See notes 4, 5, 6 and 13 *supra*.

16. (1916) L. R. 44 I. A. 42: I.L. R. 44 Cal. 379: 32 M. L. J. 71 (P.C.).
17. (1918) I. L. R. 43 Bom. 845. 18. (1929) I. L. R. 7 Rang. 744.
19. (1925) 88 I. C. 609 : A. I. R. 1925 Rang. 233.
20. (1922) I. L. R. 46 M. 190 : 43 M. L. J. 486 (F. B.).
21. (1925) L. R. 52 I. A. 214: I. L. R. 48 M. 312: 48 M. L. J. 627 (P. C.).
22. (1931) L. R. 59 I. A. 74: 62 M. L. J. 371 (P. C.).

v. *Rajah Venkatadri Appa Rao*[20] Art. 123 was applied mainly as a result of *Maung Tun Tha* v. *Ma Thit*[16] though *Khetramani Dasee* v. *Dhirendra Nath Roy*[23] was also relied on. At page 246, Mr. Kumaraswami Sastriar, J., no doubt says that "whatever doubts there may be as regards cases of intestacy, I do not see any reason for holding that a suit for a legacy or for a share of a residue bequeathed by a testator can fall under Art. 123 only if it is against an executor and not if it is against one in possession of assets which are liable for payment of the legacies. The wording of Art. 123 is general. It refers to a suit for a legacy or for a share of a residue bequeathed by a testator, and if the legatee has a cause of action against the person in possession of the assets of the testator, I do not see why there should be a further qualification that the person in possession of the assets should be an executor or administrator. I think it will be reading into the article words which are not there, ..." It is submitted that if this reasoning is correct, then there is no reason why such a qualification should be made in the case of intestacy. There are no words in the article that the suit should be against a person who is bound by law to distribute, but the case-law has added that reservation from the words 'distributive share' in col. (1) and 'payable or deliverable' in col. (3). See also the observation of Sir Lancelot Sanderson at page 375 in the Law Journal Report of *Ghulam Mahammad* v. *Shaikh Ghulam Husain*[22] that "Art. 123 assumes the existence of some one in a position who could distribute the estate". The statement at page 1479 of Mitra's Limitation (6th Edition) that for the application of Art. 123 the suit must be against "a person who is an executor under the will or otherwise represents the estate with the legal obligation to distribute the assets" may not be open to exception but to say, as Mr. Kumaraswami Sastri, J., puts it at page 247, that it should be enough if the legatee has a cause of action against the person in possession of the assets of the testator may not be quite accurate. In *Gur Bakhsh Singh* v. *Bhagwan Singh*[24] the article was applied as a logical extension to a suit by a legatee against a co-legatee in possession. It is difficult to find any duty in the co-legatee to distribute the estate. It is even diffi-

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See notes 16, 20 and 22 *supra*.

23. (1913) I. L. R. 41 Cal. 271.

24. (1923) 75 I.C. 934: A. I. R. 1924 Lah. 561.

cult to bring it under *Issur Chunder Doss* v. *Juggat Chunder Saha*[25] as the case of a person representing the estate. In *Gopala Chetti* v. *Narayanaswami Chetti*[26] Odgers, J., applied Art. 123 to a case where the executor did not enter on his duties but a third person took possession and was in management. The suit was for accounts, division and mesne profits. So far as the claim for division is concerned, it may be sought to be supported by *Rajah Parthasarathi Appa Rao* v. *Rajah Venkatadri Appa Rao*,[20] but how the claim to mesne profits can come under it, it is not clear from the report. After *Ghulam Mahammad* v. *Shaikh Ghulam Husain*[22] it has been held in *Swarnamoyee Dassi* v. *Prabodh Chandra Sarkar*[27] that the defendant must be an executor or administrator or some person legally charged with the duty of distributing the estate and therefore could not be applied to a case where the defendant was holding the property dehors the will under which the plaintiff claims.

The learned Judges in the case under review have left open the question whether failing Art. 123, Art. 142 or 144 will be applicable. The cases in *Lalu Sahu* v. *Ghunaria Uraon*[28], *Musammat Hulaso* v. *Salamat Khan*[29] and *Trilochun (alias) Koylash Chunder Chattapadhya* v. *Nubokishore Guttuck*[30] will throw light on the question. In *Lalu Sahu* v. *Ghunaria Uraon*[28] the last owner was in possession till his death and the third party defendant took possession only after his death and denied the right of legal heirs. In *Trilochun (alias) Koylash Chunder Chattapadhya* v. *Nubokishore Guttuck*[30] the trespasser was in possession even during the lifetime of the deceased. In *Maung Tun U* v. *Maung Myat Tha Zan*[31] Twomey, J., distinguishes *Ma Ye* v. *Maung Hla*[32] on the ground that in that case it was not against the representative of the deceased, whereas in the case before him, all persons interested in the estate of the deceased were made parties. But the learned Judge failed to see that so far as the claim was concerned, it was against one, who though a representative of the estate of *S*, claimed title in himself and therefore a stranger to that extent.

See notes 20 and 22 *supra*.
25 (1882) I. L. R. 9 Cal. 79.
26. (1925) 95 I. C. 33: 23 L. W. 528.
27. (1932) 36 C. W. N. 758 : 55 C. L. J. 420.
28. (1909) 2 I. C. 381.
29. (1914) 23 I. C. 521.
30. (1878) 2 C. L. R. 10.
31. (1913) 21 I. C. 335.
32. (1903) 2 L. B. R. 184.

SMITH *v.* KAILASH CHANDRA CHAKRAVARTHI, I. L. R. 11 Pat. 241.

"The difficulties of a litigant in India," said the Privy Council in 1872, "begin when he has obtained a decrée".

The position has not been very much improved since then, even after the lapse of six decades and notwithstanding the re-enactment of the Code of Civil Procedure by the Legislature. The conflicting views of Courts need not however be a factor which adds to the difficulties. It is unfortunate that the Courts should not give clear guidances as to how the decree-holder should act in one matter at least which is of fairly frequent occurrence, viz., the death of the judgment-debtor during execution proceedings. The Code is not so full as it might well be in reference to this matter. No doubt S. 50, Civil Procedure Code, provides for the execution of the decree against the legal representative if the judgment-debtor dies before the decree has been fully satisfied and O. 22, R. 12 expressly exempts execution proceedings from the operation of Rr. 3, 4 and 8 of the said Order. As there is no abatement in consequence of the judgment-debtor's death, the proceedings can be continued from the stage which they had reached. But what are the consequences if no legal representatives are brought on record before the actual sale? It is here that the Courts have taken divergent views. O. 21, R. 22, Civil Procedure Code, which requires notice to the legal representative to show cause why the decree should not be executed against him has been construed in the decision under notice as applicable at whatever stage the judgment-debtor dies. There is nothing in the terms of the rule itself which requires that the rule is applicable to cases of continuation of a pending execution application which has been already validly initiated against the judgment-debtor. The Madras Court holds that the operation of the rule may well be confined to the stage of the initial execution application. The decisions have taken the view that the issue of the notice under O. 21, R. 22 is a condition precedent to the foundation of execution proceedings and the absence of notice is a jurisdictional defect which makes the sale itself void and an absolute nullity. It is hardly necessary to have gone so far but the authority of the Privy Council decision in *Raghunath Das* v. *Sundar Das Khetri*[1] has compelled the Courts to hold so. See

1. (1914) L. R. 41 I. A. 251 : I. L. R. 42 C. 72 : 27 M. L. J. 150 (P. C.).

Rajagopala Aiyar v. *Ramanujachariar*[1]. The Courts should be reluctant to extend the principle of the absolute nullity of judicial sales. It is only when there is no legal power to sell at all that the sale should be held to be void. Other errors of procedure or wrong decisions of Court should merely be regarded as circumstances which may be good grounds for setting aside voidable sales. The decision under notice however dissents from the Madras view and holds on the authority of the Privy Council decision that the sale is a nullity because of the absence of notice under O. 21, R. 22 even at the later stage. The facts do not show when the judgment-debtor died and it is not clear if the Judges go so far as to hold that the sale will be a nullity even if the judgment-debtor dies just before the sale and if every one is ignorant of the same. There are good reasons to uphold such sales which are set out in *Dorasami* v. *Chidambaram Pillai*[2]. Whether some kind of representation at least of the deceased person's estate is not necessary before the sale can be sustained is a point on which some difference of opinion exists. The extreme view that has found favour with the Patna Court may well be modified so as to lessen the difficulties in the way of the decree-holder.

BAGESHWARI CHARAN SINGH *v.* JAGARNATH KUARI, L. R. 59 I. A. 130: I. L. R. 11 Pat. 272: 62 M. L. J. 296 (P. C.).

This decision of the Privy Council overrules the decision of the Bombay High Court in *Faki* v. *Khotu*[3] and approves of the view of West, J., in *Sakla Ram Krishnaji* v. *Madan Krishnaji*[4] as to the meaning of the word 'declare' in S. 17, cl. (1) of the Indian Registration Act. The distinction between a mere recital of an existing fact and something which operates in itself to change a legal relation in the immoveable property affected thereby is the test which will determine whether registration is necessary. The mere acknowledgment of an existing liability in respect of any property or right will require no registration as the document cannot be regarded as 'declaring' any right in immoveable property in the sense defined above. It may also be pointed out that under S. 49 the registered document cannot be received as evidence only of any *transaction*

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1. (1923) I. L. R. 47 M. 288: 46 M. L. J. 104 (F. B.).
2. (1923) I. L. R. 47 M. 63: 45 M. L. J. 413.
3. (1880) I. L. R. 4 B. 590.
4. (1881) I. L. R. 5 B. 232.

affecting such property. It is difficult to hold that there is any transaction in the case of an acknowledgment of liability under S. 19 of the Limitation Act under the Indian law. In the particular case their Lordships hold that the document in question "contains a clear acknowledgment that unless one of two things is done she has no title or in other words that she recognises that the title is in the Thakur, her husband and not in herself". It is not so expressly stated in the document but it must be taken as a legal inference from admitted facts. An acknowledgment need not state every legal consequences of the thing acknowledged. Their Lordships must have applied this principle in construing the language of the document relied on. The petition praying for sanction of the prior gift or for a new deed of gift to be made is treated as an acknowledgment that there is no valid gift in law so far, and that the property continues to belong to the donor. In terms the parties merely expressed a doubt as to whether the deed of gift already executed was valid and prayed for sanction. Their Lordships must, however, have proceeded on the view that the doubt was not a *bona fide* one and that the real prayer was for sanction of a gift which was otherwise void and inoperative.

MUSSAMUT SHEORATAN KOER *v.* KAMTA PRASAD, I. L. R. 11 Pat. 415.

The soundness of this decision is open to doubt in so far as it holds that the defendant could not redeem over against the plaintiff. The plaintiff's right as puisne mortgagee who was not impleaded in the prior mortgagee's suit cannot be affected by that proceeding and he therefore had certainly a right to redeem the prior mortgage which had passed to the defendant auction-purchaser. But this does not enlarge his rights and cannot operate to confer on him an immunity from redemption of his own mortgage which the original mortgagor could exercise against him. The purchase in Court auction in the prior mortgagee's suit transfers to the purchaser not only the right of the prior mortgagee but also the rights of the mortgagor. As the owner of the equity of redemption vested in the original mortgagor, the auction-purchaser defendant could redeem over against the plaintiff. The omission to implead the puisne mortgagee in the first suit does not justify the view that the interests of the mortgagor do not pass to the

auction-purchaser in the first sale. The respective rights of the auction-purchaser and the mortgagee in such cases have been the subject of careful consideration in the Full Bench judgment of the Allahabad High Court in *Ram Sanehi Lal* v. *Janki Prasad*[1].

Justice Sulaiman, with whose judgment the majority of the Judges agree, discusses the question elaborately in the light of the principles which ought to govern the matter. No reference is made at all to that Full Bench judgment in the present decision but on the other hand it is rather facilely assumed that to allow a right of redemption of the plaintiff's puisne mortgage will destroy his rights as such mortgagee.

That the auction-purchaser in the improperly constituted suit of the prior mortgagee gets the rights of the mortgagor also, is the view of all the learned Judges. The previous proceedings are not a nullity. The auction-purchaser will have the same rights as if he had obtained an assignment of the rights of the encumbrancers who were parties to the suit and a transfer from the owner of the equity of redemption. Justice Mukerji also agrees with this view though he differs on some other points. Whether the puisne mortgagee has only a right of redemption of the first mortgage or whether he can bring his own suit for sale ignoring the prior mortgagee's suit is a point on which there is some difference of opinion in the Courts. So also the question which of the two auction-purchasers in the two suits brought by two simple mortgagees, each without impleading the other, is entitled to possession as ultimate owner is one on which the Courts have differed. *Chinnu Pillai* v. *Venkatasamy Chettiar*[2]; *Chinnasami Padayachi* v. *Darmalinga Padayachi*[3]. But there is no doubt that the purchaser in the prior mortgagee's sale can redeem the puisne mortgage before a sale takes place in the action of the puisne mortgagee.

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1. A. I. R. 1931 All. 466 (F. B.).
2. (1915) I. L. R. 40 M. 77: 30 M. L. J. 347.
3. (1932) 63 M. L. J. 394.

MANOHAR DAS MOHANTA *v.* HAZARIMULL, I. L. R. 59 Cal. 463: 61 M. L. J. 343 (P. C.).

In this case, a mortgagee paid the arrears of revenue to avert a revenue sale under the Bengal Revenue Sales Act, S. 9, after the mortgagee had obtained final decree in a suit on his mortgage and pending the execution sale; and the question was whether he could maintain a second suit on the charge provided for under the section and in the mortgage deed. Their Lordships answered the question in the affirmative. What is more important is the reasoning underlying their decision and the conclusion that the payment is of the nature of a salvage payment made on behalf of all persons interested in the properties and that the payment entitled the person making it to a first charge in respect of the same on the properties or their sale proceeds. To this extent, their Lordships have affirmed the dictum in *Nagenderchunder Ghose* v. *Kaminee Dossee*[1] to the effect that apart from the statute such a payment would give the mortgagee making the payment a first charge. It may be noticed, in this connection, that the seventh defendant in the case under review was not only a puisne mortgagee but a prior mortgagee in respect of some of the items and their Lordships have declared a first charge in respect of the sale proceeds even as against him. We have no reason to doubt that their Lordships have given the first charge deliberately and not by mere oversight, as their Lordships have given the reason for doing so on the ground of the payment being of the nature of a salvage payment and on behalf of all persons interested, including, we believe, the prior mortgagee.

The observations in *Nagenderchunder Ghose* v. *Kaminee Dossee*[1] referred to above have not been given full effect in some of the High Courts, and it has been held by the Calcutta, Allahabad and Bombay High Courts that they have no application to a co-tenant making a payment and averting the revenue sale of the lands belonging to himself and his co-sharers while the Madras High Court has held in *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhararas*[2] that they apply to co-tenants as well. The decision of Sir V. Bhashyam Aiyangar

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1. (1867) 11 M. I. A. 241 at 258.
2. (1903) I. L. R. 26 M. 686: 13 M. L. J. 83 (F. B.).

and Sir S. Subramania Aiyar, JJ., in the above case leave no aspect of the question untouched.

The point in the case is also the subject of legislative enactment under section 72 (*b*) of the Transfer of Property Act. Though the section as it originally stood had reference only to the case of a mortgagee in possession, the same principle has been applied even to cases of mortgagees not in possession. See *Nadershaw Sheriarji Rabadi* v. *Shirinbai Bapuji Musa*[1]. The recent amendment of the Transfer of Property Act has made section 72 applicable in terms to cases of mortgagees in possession and even without possession. The effect of the section is to give the mortgagee the right to add the revenue payment to his mortgage money giving it the same priority as his mortgage. But as we have pointed out above the observations in the case under notice seem to go further and declare a first charge in respect of the payment.

The question whether the payment of rent by a co-sharer gives him a first charge recently came up before the Madras High Court in *Vyraperumal Mudaliar* v. *K. Alagappa Maniagarar*[2] and has been answered in the negative. Rent has been declared a first charge on the holding by section 5 of the Madras Estates Land Act; but it was held by the Privy Council in *Arthur Henry Forbes* v. *Bahadur Singh*[3] under the corresponding provision of the Bengal Tenancy Act that such charge was only in favour of the landholder and while he continued to be such. It may well be doubted, whether the learned Judges in *Vyraperumal Mudaliar* v. *K. Alagappa Maniagarar*[2] have given full effect to the decisions in the case under notice and *Nagenderchunder Ghose* v. *Kaminee Dossee*[4] and *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhararaz*[5].

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1. (1923) 25 Bom. L. R. 839 at 843.
2. (1931) 34 L. W. 889.
3. (1913) L. R. 41 I. A. 91 : I. L. R. 41 C. 926 : 27 M. L. J. 4 (P. C.)
4. (1867) 11 M. I. A. 241.
5. (1903) I. L. R. 26 M. 686 : 13 M. L. J. 83 (F. B.).

RIPON PRESS AND SUGAR MILL CO., LTD., BELLARY *v.* GOPAL CHETTI, L. R. 58 I.A. 416: I. L. R. 55 Mad. 180: 61 M. L. J. 783 (P. C.).

Neither the Courts nor the lawyers in this country are quite familiar with Company Law, Companies being not much in evidence here and it is not surprising that what appear to lawyers in England steeped in Company Law to be unjustifiable mistakes are sometimes perpetrated in the administration of that law. The rather strongly worded judgment of Lord Blanesburgh is useful in that it pointedly draws attention to the caution that is necessary in the administration of that Law. In the first place, His Lordship makes it clear that in the case of a solvent company which is sought to be wound up on the ground that "it is just and equitable to do so," neither the fact that one person has a preponderating influence by reason of his owning or controlling a large number of shares nor the fact that dividends have not been regularly paid nor yet the fact that some *ultra vires* transactions have been entered into by the directors is a reason for making a winding-up order and that both in making the order of winding up and in making orders in the course of winding up, the Court must have regard to the wishes of contributories. His Lordship indicates that acts done by the directors with such consent even after the winding-up order ought to be supported, when there are no creditors whose interests are likely to be prejudiced by such acts and that even it the Court finds reason to set them aside, the Company must be made to restore the benefit obtained by such transactions.

As a point of practice His Lordship points out that appeals from winding-up orders should be in the name of the Company and also indicates that leave for appeal should be given when the majority of the contributories are against winding up. His Lordship further impresses on Courts the necessity for promptness in the disposal of appeals in the case of winding-up petitions and in this case, having regard to the long lapse of time, during which time the winding-up order was in operation, His Lordship refused to disturb the order of winding up though he considered that it ought never to have been made.

The judgment contains valuable observations as to the conduct of official liquidators. His attitude must be one of complete impartiality and his duty in an appeal from an order is in the interests of the whole body of his constituent contributories to be ready to inform the Court of any facts and

circumstances in relation to the company's affairs about which he might be asked or which in his judgment the Court ought to know.

KADIYALA VENKATASUBBAMMA *v.* KATREDDI RAMAYYA, L. R. 59 I. A. 112: I. L. R. 55 Mad. 443 : 62 M. L. J. 365 (P. C.).

Their Lordships affirm, in this case, the view of the Madras Full Bench in *Ramiah* v. *Venkatasubbammal*[1] as against the Calcutta view as expressed in *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu*[2] and *Sakina Bibee* v. *Mahomed Ishak*[3] and hold that the executor under a Hindu will executed in the mofussil has all the powers of an executor under the Probate and Administration Act and the property also vests in him though no probate has been taken out. On the language of S. 90 as it stood before 1889, there might have been some support for the contrary view but on the terms of the section as amended in 1889, there could be no doubt. In *Administrator-General of Bengal* v. *Prem Lal Mullick*[4] and *Kurrutulain Bahadur* v. *Nusbat-ud-dowla Abbas Hossein Khan*[5] the contrary view seems to be assumed but their Lordships had no occasion to consider the point or to express an opinion as between the two contending views. The contrary view was largely based on the preamble which showed that the object of the Act was to provide for grant of probate and letters of administration and upon the heading of Chapter II which their Lordships consider is not justified. In England the title of the executor is derived from the will and not from the probate though it is the probate alone that authenticates the right. The same is the case under the Succession Act of 1865. There is no reason to hold, their Lordships think, that a different rule was intended under the Probate and Administration Act though the absence of a provision like S. 187 of the Succession Act (corresponding to S. 213 of the present Act) in the case of mofussil wills avoids the necessity for a probate in order to establish the right under the will. While in cases to which that provision applies, an alienation by an executor cannot be maintained by reference to his powers as such so long as probate

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1. (1925) I. L. R. 49 Mad. 261: 50 M. L. J. 308 (F.B.).
2. (1898) I. L. R. 25 Cal. 103. 3. (1910) I. L. R. 37 Cal. 839.
4. (1895) L. R. 22 I. A. 107. I. L. R. 22 Cal. 788: 5 M. L. J. 157 (P. C.).
5. (1905) L. R. 32 I. A. 244: I. L. R. 33 Cal. 116: 15 M. L. J. 336 (P. C.).

is not taken out in the case of mofussil wills it can be so done though even in the former case when once the probate is taken out, alienations prior to such taking out of probate can be supported by reference to his powers as executor.

SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* SUBBARAYUDU, L. R. 59 I. A. 56: I. L. R. 55 Mad. 268: 62 M. L. J. 213 (P. C.).

This case sets at rest the controversy that has been going on about the true construction of the words "river belonging to the Government" and "engagement" in the Madras Irrigation Cess Act. Their Lordships hold that a river cannot be said to belong to Government unless the solum belongs to the Government which will happen when the Government is the proprietor of the lands abutting on the river on both sides or when the river is tidal and navigable and that this meaning has not been affected by the Land Encroachment Act. Their Lordships also hold that natural rights are within the engagement implied in the permanent settlement and therefore also within that expression in the Irrigation Cess Act.

The judgment of their Lordships also contains a valuable exposition as to the scope of the riparian rights. Their Lordships would seem to restrict the duty referred to in *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company*[1] and *McCartney* v. *Londonderry and Lough Swilly Railway Company*[2] of restoring water to cases of diversion of the stream and when only part of the stream is taken for purposes of irrigation the only limitation is that the amount taken shall not be so much as to hurt the right of the inferior owner to have the stream passed on practically undiminished. In the matter of riparian rights there is no difference between tidal or navigable rivers and other rivers for the rights of the riparian owner do not depend on the ownership of the soil of the stream but on vicinity and those rights extend if necessary to complete exhaustion for what are known as primary rights, *i. e.*, for domestic use and to the limited extent indicated above for other uses connected with land of which irrigation is one. The riparian right is, their Lordships point out, a natural right and as such is not capable of being lost *non utendo* (by non-user)

1. (1875) L. R. 7 H. L. 697.
2. (1904) A. C. 301 at 307.

and to it the maxim *tantum prescriptum quantum possessum* (restricting prescriptive right to the extent of user) has no application. Subject to the right of the lower proprietor (in this case there was no complaint by any lower proprietor) the higher proprietor has an absolute right to take the water and use it for irrigation of his property.

RAMASWAMI AIYAR *v.* RANGASWAMI AIYAR, I. L. R. 55 Mad. 26: 61 M. L. J. 933.

A fiscal statute should be construed strictly and cannot be extended by analogy. The attempt made on behalf of the Crown in this case was to charge the claim of the creditor who put in his claim in pursuance of a direction under a preliminary decree in a suit for administration brought by another creditor as if it were a plaint but it is neither a plaint nor a set-off nor as their Lordships point out is the action a representative action. If the action by the creditor is barred at the time of the judgment he cannot make a claim. The action may be withdrawn by the creditor suing; his suit cannot proceed if the executor pays his debt into Court (*Shashi Bhushan Bose* v. *Manindra Chandra Nandy*[1], *Athalur Malakondiah* v. *Lakshminarasimhalu Chetty*[2] and *Bray* v. *Tofield*[3]). An administration suit is regarded in Ireland however as a representative suit. Even so, it is not clear how court-fee can be levied from the creditor putting in his claim. It may be a ground for making the creditor suing to pay for the other people's claims also.

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1. (1916) I. L. R. 44 Cal. 890. 2. (1914) 26 M. L J. 312.
3. (1881) 18 Ch. D. 551.

SAMUVIER *v.* RAMASUBBIER, I. L. R. 55 Mad. 72 : 60 M. L. J. 527.

In this case their Lordships dissent from *Venkataratnam* v. *Subba Rao*[1] which took the view that a release of a partner of his interest in certain immovable property belonging to the partnership in favour of the other members did not require registration and we think rightly. Partnership is not a corporate entity distinct from the partners and the partners are the joint owners of all the partnership property and a release by one partner of his interest necessarily involves a transfer of interest in immovable property. The right of a member of a Hindu family to which the right of a partner has been compared in the immovable property of the family has been always treated as immovable property and a release by him of his interest would require registration if in writing. Because the incidents of the joint ownership involved in partnership are different from those involved in ordinary tenancy in common, or joint tenancy, or the joint tenancy of a member of a Hindu family, it does not follow that it is any the less an interest in immovable property. In the converse case of a man going to be a partner transferring lease belonging to himself to the partnership it has been held that the deed requires registration, *Arseculeratne* v. *Perera*[2]. Similarly a floating charge on the assets of a Company has been held to require registration if the charge is claimed on that portion of the assets which are represented by immovable property. *The Imperial Bank of India* v. *The Bengal National Bank*[3].

The further question in the case was as to whether a document which cannot affect the immovable property by reason of non-registration can affect movables or can stand in respect of other stipulations not connected with the immovables and which if they stood alone could be enforced. We think the true test has been suggested in this case. The whole question is whether the different parts are so interconnected that it may be safely assumed that the validity of the one part was condition precedent to the enforcing of the other. In the case of a charge on the movables as well as immovables, there is no reason why one part should not be enforced while

1. (1926) I. L. R. 49 Mad. 738 : 51 M. L. J. 410.
2. (1928) A. C. 173.
3. (1931) 61 M. L. J. 589 (P.C.).

the other may not be. *The Imperial Bank of India* v. *The Bengal National Bank*[1]. Similarly in the case of gifts. *Perumal Ammal* v. *Perumal Naicker*[2]. In the case of partition there is no reason when an aliquot share is allotted of the movables and a separate aliquot share of immovables to each sharer, why the one should not stand while the other may not. The case would be quite different if one sharer is given immovable property and the other movable only, the extra share in each being the *quid pro quo* for the extra share in the other. *Lakshmamma* v. *Kameswara*[3] is typical of the latter class, *Thandavan* v. *Valliamma*[4] of the former. S. 85 of the Contract Act is a statutory illustration of the same rule. In *Arseculeratne* v. *Perera*[5] while recognising that if during the currency of the partnership the plaintiff had sought to compel the defendant to put the mine at the disposal of the Company (which for want of registration of the partnership agreement had failed to pass to the partnership) and the defendant had refused to do so, the *substratum* of the partnership would have disappeared and the partnership must have been dissolved, the partnership having continued in spite of it, their Lordships directed accounts to be taken of the partnership business overruling in that respect the judgment of the Lower Court which had dismissed the action in the view that the agreement was one and indivisible and the stipulation as to the transfer of the lease being ineffective, the whole agreement was void and of no effect.

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1. (1931) 61 M. L. J. 589 (P. C.).
2. (1920) I. L. R. 44 Mad. 196 : 40 M. L. J. 25.
3. (1889) I. L. R. 13 Mad. 281.
4. (1892) I. L. R. 15 Mad. 336 : 2 M. L. J. 130.
5. (1928) A. C. 173.

MAHARAJADHIRAJ KAMESHWAR SINGH BAHADUR *v.* BENI MADHO SINGH, I. L. R. 11 Pat. 430.

A decree for mesne profits against a Hindu widow, on the ground of an unauthorised encroachment by her on the plaintiff's property and illegal perception of the profits thereof is one which is *prima facie* against her personally and not against the estate represented by her. It may be otherwise if there is evidence to show that it was in assertion of the right of the husband's estate to the trespassed properties that the widow committed the act of trespass and received the profits. Even in the latter case, only if she had also been sued in her representative capacity, the decree could be executed, on the death of the widow, against the estate of the husband in the hands of the reversioners who succeed to it. If the reversioners are to be made liable, it should be established that not only that the foundation of the decree is a liability which is binding on the reversioners but the suit also must have been so framed as to seek for a decree against the widow in her representative capacity. *Lalit Mohan Pal Roy* v. *Dayamoyi Roy Chowdhurani*[1]. See also *Sethurama Aiyar* v. *Varadaraja Aiyar*[2]. The decision under notice no doubt rightly lays down the law as stated above but it is not clear whether the application of it to the facts of the case is quite correct. The widow had appealed against the decree granting mesne profits against her but as she died during the pendency of the appeal the reversioner to the husband's estate got himself impleaded as the legal representative to continue the appeal. This could only have been on the allegation of the reversioner that the widow was not being sued personally but only in a representative capacity and that the cause of action had survived to him. Otherwise he would not have been added as a party to the appeal, as the proper legal representative would have been the heir-at-law of the widow herself. In those circumstances the reversioner could not be allowed when his appeal was dismissed ultimately to turn round and say that the decree of the Trial Court was not against the estate but only against the widow in her personal capacity. In *Rajah of Ramnad* v. *Sundara Pandiyasami*[3] the Privy Council held it was too late for the defendant to object in appeal before

1. (1926) 52 M. L. J. 426 (P. C.). 2. 1931 M. W. N. 1282.
3. (1918) L. R. 46 I. A. 64: I. L. R. 42 Mad. 581: 36 M. L. J. 164 (P. C.).

the Privy Council that the reversioner who had been brought on record without objection as legal representative of the plaintiff widow during the trial of the suit in the Court of first instance was not really the proper legal representative even as regards a part of the suit claim. The present case would seem to be a stronger one for holding that the reversioner who himself urged and got the Court to accept his position as legal representative is estopped from contending to the contrary in later proceedings such as execution of the ultimate decree.

NAGENDRA NATH DEY *v.* SURESH CHANDRA DEY, L. R. 59 I. A. 283: 63 M. L. J. 329 (P. C.).

This decision is of far-reaching importance and settles a controversy that has remained unsettled for several years past. The point decided is as to the meaning of the term "appeal" in column three of Art. 182 (2) of the Limitation Act. The judgment under notice sets out briefly the conflicting decisions but proceeds to decide the meaning of the term, as their Lordships say, upon the plain words of the article. They say that there is no warrant for reading into the words quoted any qualification as to the *character* of the appeal or as to the *parties* to it (the italics are ours). "Equitable considerations are out of place and the strict grammatical meaning of the words is the only safe guide." This rule of interpretation emphasised by their Lordships is sure to be relied on in future decisions as to the construction of various other articles in the Limitation Act. The controversy as to "suspension of limitation in cases which do not come strictly under S. 9 or S. 14" is one such instance in point.

An appeal is, according to this judgment, in the absence of any statutory definition, "an application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court. An appeal is no less an appeal because it is irregular or incompetent." It will be noticed that in the particular case the party to the original suit purported to file an appeal against a particular decision of the Subordinate Judge, negativing his rights. There was as a matter of fact a right of appeal to the High Court against that decision though the party appealed against the order and not against the decree which was drawn up. The appeal was dismissed as irregular for want of

sufficient stamp and it failed on the merits as well, when it was heard finally after notice to the respondents. In those circumstances their Lordships rejected the contention that there was no appeal at all but only an abortive attempt to appeal. Their Lordships also decide categorically (settling the controversy on this point among the High Courts) that an appeal need not necessarily imperil the whole decree nor is it necessary that the persons against whom the new starting point is sought to be enforced should be parties to it. The generality of language used as regards the term "appeal" cannot be extended however, irrespective of the actual facts. It may still be that every abortive attempt to appeal cannot be regarded as an appeal for the purpose of this article. Different considerations may arise in other cases as for instance where a party seeks permission to file an appeal after excusing the delay under S. 5 of the Act and the permission is refused or where a person not a party *eo nomine* to the suit seeks to prefer an appeal against a decree as one purporting to be aggrieved by the decree and the same is not allowed by the appellate Court in the view that the appellant has no *locus standi* to prefer the appeal. More light would have been available if their Lordships had discussed the reasoning of the conflicting High Court judgments on this point.

NAGARMAL MARWARI *v.* KING-EMPEROR, I. L. R. 11 Pat. 493.

The interpretation of the terms of O. 21, R. 46, Civil Procedure Code, adopted by this judgment, as regards the correct mode of attachment of moveable properties of the judgment-debtor in the *physical* possession of third persons is a wholesome one. The Code provides carefully in a fasciculus of clauses for varying modes of attachment suited to the nature of the property. The attachment is a real thing different from the order of a Court directing attachment. See *Muthiah Chetty* v. *Palaniappa Chetty*[1]. If the actual possession of the moveables is with a third person, the attachment can only be by an order of prohibition under cl. (3) of O. 21, R. 46. If the third person has merely the custody on behalf of the judgment-debtor

1. (1928) I. L. R. 51 Mad. 349: 55 M. L. J. 122 (P. C.).

MACKAY *v.* MAHARAJADHIRAJ KAMESHWAR SINGH, I. L. R. 11 Pat. 600: 63 M. L. J. 270 (P. C.).

This judgment decides an important point as to the locality of the relevant market for the purpose of estimating damages for failure to deliver goods as per contract between the parties. The place of delivery contemplated by the parties was Purnea, but the evidence showed that the actual market where the goods in question (indigo seed in this case) were bought and sold and to which the buyers and sellers in Purnea resorted for the commodity required at Purnea was Cawnpore, a place 300 miles away. Their Lordships held that there is no absolute rule of law that the place of delivery fixed is the locality of the relevant market and that the Lower Courts went wrong in holding that there was no market price that could be ascertained. The question as to what is the locality of the relevant market is one of fact to be decided upon the evidence as to where the intending buyers and sellers usually transact the sales for delivery of the goods at the stipulated place. It is a well-established usage in the case of certain articles that transactions of sale and purchase are carried on only in a central market at a particular place from which the goods are sent to all other places round about. The actual area for which a central market thus functions may depend upon the usage and other circumstances of the particular line of mercantile business. In such cases, the market price as on the date of breach may well be ascertained by ascertaining the market price at the place where the commercial transactions usually take place and then making the necessary allowance for cost of transit to the actual place of delivery agreed upon.

The judgment of the Privy Council also corrects some other fallacies of the Lower Court. In calculating the damages the High Court went wrong in ascertaining the market price on the basis of the price of the goods on an earlier date for forward delivery on the date of breach. This is incorrect and it is only the difference between the market price of spot goods on the date of breach and the contract price, that can be decreed as the damages sustained.

It will be noted that the Privy Council allows the buyer not only a refund of the earnest money advanced by him but also interest thereon at 12 per cent. till date of decree. The Madras

High Court decided by a majority view (prior to Act III of 1930) that interest cannot be claimed under such circumstances (Justice Ramesam dissenting) notwithstanding the illustrations to S. 73 of the Indian Contract Act. No reference is however made to this decision, *Kandappa Mudaliar* v. *Muthusami Aiyar & Sons*[1], by the Privy Council judgment and it is not clear if the said Full Bench decision of the Madras Court should be deemed to be impliedly overruled. (Our reporter writes to us to say that the point as to interest was not argued.—Ed.) S. 61 of Act III of 1930 however now empowers the Court to award interest.

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1. (1926) I. L. R. 50 Mad. 94: 51 M. L. J. 765 (F. B.).

ARUNACHALAM *v.* VEERAPPA CHETTIAR, I. L. R. 55 Mad. 17: 61 M. L. J. 348 (F. B.).

A Full Bench of five Judges hold in this case that O. 9, R.13 does not apply to such execution proceedings as fall within S. 47, Civil Procedure Code. In *Alagasundaram Pillai* v. *Pichuvier*[1] it was held by a Full Bench that neither O. 9, R. 9 nor S. 151 enabled the Court to restore an application under R. 97 or 98 of O. 21 dismissed for default. Their Lordships recognise that that conclusion might involve real hardship in some cases. But the remedy, they think, is in the hands of legislature. An order made in circumstances in which a party has had no real opportunity to be heard may not operate as *res judicata*, *Mochai Mandal* v. *Meseruddin Mollah*[2], *Monmohan Karmokar* v. *Dwarka Nath Karmokar*[3] and *Alikjan Bibi* v. *Rambaran Shah*[4]; and in that sense there may not be much of a hardship though it may be doubted if that would protect in all cases in which O. 9, R. 13 might protect. The hardship may be greater in cases of dismissal for default, though no doubt the non-application of the order also excludes the application of the rule in O. 9, R. 9 which precludes a fresh suit on the same cause of action and as such a fresh application on the same facts would not be barred. But the consequence of the dismissal might be serious where rules of limitation like those enacted in Arts. 181, 182 or 166 or in S. 48, Civil Procedure Code, might operate in bar of a fresh application. Relief might be given in a few cases treating the fresh application as a continuation of the old proceeding. See *Ramanuja Aiyangar* v. *Narayana Aiyangar*[5]. In some limited cases, appeal to inherent powers also may be made. See *Debi Bakhsh Singh* v. *Habib Shah*[6] and *The Bolivar*[7]. Can a Court dismiss for default of appearance merely when there is no rule enabling it to do so? If appeal to inherent powers is admissible for the purpose of enabling it to do so, could not appeal be made to the same powers to restore an application dismissed for default? The trend of decisions in the Madras High Court would seem to be against appeal to such powers.

[END OF VOLUME LXIII.]

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1. (1929) I. L. R. 52 Mad. 899: 57 M. L. J. 381 (F. B.).
2. (1910) 13 C. L. J. 26.
3. (1910) 12 C. L J. 312.
4. (1910) 11 C. L. J. 357.
5. (1895) I. L. R. 18 Mad. 374.
6. (1913) L. R. 40 I A 151: I. L. R. 35 All. 331: 25 M. L. J. 148 (P.C.).
7. (1916) 2 A. C. 203.

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NOTES OF RECENT CASES.

Ramesam, J. C.R.P. No. 230 of 1931.
3rd May, 1932.

Civil Procedure Code (*V of* 1908), *S.* 141 *and O.* 9, *R.* 9—*Application for leave to sue* in forma pauperis—*Dismissal for default—Whether Court has jurisdiction to restore it.*

When an application for leave to sue as a pauper came on for hearing and it was dismissed for default, the Court had jurisdiction to restore the same under O. 9, R. 9 read with S. 141 of the Civil Procedure Code (V of 1908).

M. S. Vaidyanatha Aiyar for Petitioner.

P. J. Kuppanna Rao for Respondent.

K.C.

Curgenven and Sundaram Chetty, JJ. A.S. No. 261 of 1925.
4th May, 1932.

Evidence Act (*I of* 1872), *Ss.* 32, 35 *and* 74—*Official correspondence—Office copy—Pedigree maintained by family priest—Admissibility.*

A certified copy of an office copy maintained in registers of official correspondence is admissible in evidence under S. 35 read with S. 74 of the Evidence Act.

40 Mad. 871 and 2 Mad. 128 (P.C.) relied on.

Pedigrees maintained by family gurus or priests for their own use or for the use of the family are admissible in evidence under S. 32 of the Evidence Act even if the guru or priest who prepared the same is dead.

46 Bom. 753 and 46 All. 665 followed.

T. Rangachariar and *A. Lakshmiah* for Appellants.

S. Varadachariar and *V. Suryanarayana* for Respondents.

B.V.V.

Curgenven, J.
11th May, 1932.

C.R.P. No. 1768 of 1928
and
C.M.P. No. 1627 of 1929.

Civil Procedure Code (*V of* 1908), *O.* 41, *Rr.* 20, 22—*Practice —Addition of party respondent after time—Power of Appellate or Revisional Court—Object of such addition to enable the preferring of a memorandum of cross-objections—Power of Revisional Court to entertain a memorandum of cross-objections.*

An Appellate or Revisional Court has no power to add a party respondent after time under O. 41, R. 20 with a view to facilitating the filing of a memorandum of objection against him. The High Court has no power to entertain the memorandum of objections in a Civil Revision Petition.

1929 M.W.N 381; 53 Cal 270 and A.I.R. 1928 Mad. 794 referred to.

C. A. Seshagiri Sastri for Petitioner.

V. K. Srinivasa Aiyar for Respondent.

T. S. Vaidyanatha Aiyar and *G. Gopalaswami Aiyar* for Respondents in C.M.P. No. 1627 of 1929.

K.C.

Beasley, C.J.
12th May, 1932.

C.R.P. No. 349 of 1929.

Civil Procedure Code (*V of* 1908), *S.* 73—*First decree against two brothers—Second decree against one of them—Sale of properties in execution of decree against both brothers—Second decree-holder only entitled to rateable distribution against share of the brother against whom his decree was obtained.*

Where a decree is obtained against a joint family composed of two brothers and the sons of one of them, and there is another decree against one of the brothers alone and the joint family properties are sold in execution of the first decree, the second decree-holder is entitled to rateable distribution due in respect of the share of the brother against whom he got the decree and not in respect of the whole sale-proceeds.

54 M. L. J. 278 followed.

C. A. Seshagiri Sastri for Petitioner.

K. S. Desikan for Respondent.

K.C.

Sundaram Chetty, J. S. A. No. 516 of 1929.
26th July, 1932.

Negotiable Instruments Act (*XXVI of* 1881), *S.* 17—*Stamp Act, Ss.* 6, 35, 36 *and* 42 (2)—*Negotiable instrument—Holder's right to elect under S.* 17, *whether taken away by S.* 6 *of Stamp Aqt* (*II of* 1899)—*Document—Admissibility—Appellate Court's right to refuse to act upon it after once admitted in evidence, whether permissible—Scope of S.* 42 (2).

The right of election given under S. 17 of the Negotiable Instruments Act to the holder of an instrument to treat it as a promissory note or as a bill of exchange is a privilege which he must have the full advantage of, and that benefit cannot be taken away by the provision contained in S. 6 of the Stamp Act which requires that when an instrument comes within two or three descriptions chargeable with duties differently, it should be charged only with the highest of such duties.

It would be reasonable to regard S. 17 of Negotiable Instruments Act as a proviso to S. 6 of the Stamp Act.

Once a document has been admitted in evidence by the Lower Court under S. 35 of the Stamp Act, such admission cannot be questioned at any later stage of the suit or proceeding on the ground that the instrument has not been duly stamped and the natural consequence of that admission must also follow. The Appellate Court cannot say that it is only precluded from questioning the admission of such an instrument, but that it is at liberty not to act upon it, viz., it would not look into it and would not make use of it in the appreciation of evidence or would not allow a decree to be passed on the document.

27 C.W.N. 513 and 53 Cal. 515 referred to.

Section 42 (2) of the Stamp Act has no application to a case where no duty and penalty have been levied by the Lower Court but the document itself is treated as duly stamped by the Lower Court.

S. Varadachariar and *V. Ramaswami Aiyar* for Appellant.

M. Patanjali Sastri and *A. Nagaswami Aiyar* for Respondents.

K.C.

Sundaram Chetty, J. S. A. Nos. 1088 to 1092 of 1930.
28th July, 1932.

Civil Procedure Code (*V of* 1908), *S.* 11—*Identity of parties—Municipal Council and Chairman of Municipality—Prior decision being erroneous in law—Matter whether can be re-agitated.*

In a prior suit filed against a Municipal Council the owners of a rice mill had obtained a declaration and injunction regarding their non-liability for a certain licence fee. The Chairman of the Municipality subsequently sued the plaintiff in the prior suit for a declaration that they were liable for the fee.

N.R.C.

Held, that there was a legal identity of parties having regard to the sections of the Madras District Municipalities Act and that the prior decision operated as ***res judicata.***

If the former decision on a question of law is found to be erroneous, the same question can be re-agitated and another decision may be given, but without affecting the rights already acquired under the erroneous view of the law in the prior suit.

56 Cal. 723 relied on.

V. Ramaswami Aiyar for Appellant.

T. V. Muthukrishna Aiyar for Respondent.

B.V.V.

Madhavan Nair, J. C.M.S.A. No. 178 of 1930.
1st August, 1932.

Limitation Act (IX of 1908), *Art.* 182, *cl.* (5)—*Amending Act IX of* 1927—*Starting point for execution when no final order was passed on execution application.*

Where a second execution application, filed after the Amending Act IX of 1927, was returned for correction of some errors and a third application was filed and along with this application the second application was re-presented and it was contended that there having been no final order on the second application, it was to be ignored and the third application having been more than three years after the first application, it was barred by limitation.

Held, that there having been no final order on the second application, it had to be regarded as still pending, that the question of limitation did not arise and that the Court would have to pass final orders on second application and then should, if necessary, consider whether third application was in time or not.

C.R.P. No. 5 of 1930, Judgment of Jackson, J., referred to.

T. M. Krishnaswami Aiyar, R. Somasundaram Aiyar and *V. K. Srinivasa Aiyangar* for Appellant.

C. S. Venkatachariar and *K. S. Narayana Aiyangar* for Respondents.

K.C.

Jackson and Mockett, JJ. S. A. No. 1060 of 1928.
2nd August, 1932.

Sale of goods—Breach of contract—Mixing goods of inferior quality—Right of buyer to repudiate contract—Waiver—Seller's omission to tender goods—Refund of advance paid with interest.

In pursuance of a contract for the sale of sixty bales of yarn the seller tendered twenty-eight bales which were taken delivery of by the buyers. Nine bales were subsequently tendered and rejected but the balance was never tendered. It appeared that out of nine bales tendered three were of defective quality but the buyers instead of bringing that fact to the notice of the sellers repudi-

ated the contract in its entirety. The buyers having sued for a return of the advance made to the sellers with interest in respect of the thirty-two bales which they had not taken delivery,

Held, that the conduct of the buyer in respect of the three bales amounted to a waiver of the conditions precedent to acceptance, that he could not later on raise the plea that on account of the defect of quality he was justified in rejecting the nine bales and therefore he was not entitled to a refund of the advance in respect of those bales.

(1905) 2 K.B. 543, (1923) A.C. 48, 49 M.L.J. 1 and 49 M. 781 referred to.

Held, however, that the sellers, having elected to keep the contract alive so far as the remaining twenty-three bales were concerned, were in fault in not having tendered them and the buyer was consequently entitled to a return of the earnest money with interest on account of those bales.

T. R. Venkatarama Sastri and *N. Rajagopala Aiyangar* for Appellants.

Nugent Grant instructed by *T. Krishnaswami Aiyangar* and *S. K. Narasimhachari* for Respondents.

B.V.V.

Burn, J. Cr. R. C. No. 206 of 1932.

2nd August, 1932.

Criminal Procedure Code (V of 1898 as amended), S. 539-B—Local inspection by Magistrate—Memorandum of relevant facts—Omission to make—Effect.

Where a Magistrate did not make any memorandum of the relevant facts observed by him at the inspection and it was shown that the accused had been prejudiced on that account,

Held, that the proceedings were vitiated.

V. Govindarajachari and *N. Vasudeva Rao* for Petitioner.

The Public Prosecutor (L. H. Bewes) for the Crown.

Y. Suryanarayana for Respondent.

B.V.V.

Madhavan Nair, J. C.M.S.A. No. 129 of 1930.

2nd August, 1932.

Insolvency—Hindu joint family—Adjudication of father—Rights of Official Receiver—Collection of rents of family properties for payment of binding debts.

On the insolvency of a father in a Hindu joint family the shares of the sons do not vest in the Official Receiver but so long as the debts are not immoral or illegal he has got the right to sell them. In fact, he is entitled to be in joint possession with the sons of all the family properties. And in the exercise of the rights of the manager which accrued to him he has a right to collect the rents from the shares belonging to the minor sons for the purpose of paying off the father's creditors.

46 M. 54, 49 M. 849, 51 M. 417 and 51 M. 567 referred to.

T. Krishna Rao for *B. Sitarama Rao* for Appellant.

M. A. T. Coelho for Respondent.

B.V.V.

Sundaram Chetty, J. S.A. No. 712 of 1930.

2nd August, 1932.

Hindu Law—Pre-nuptial settlement—Construction of—Absolute estate subject to defeasance clause, whether permissible—Gift-over clause when void as repugnant and when operative as valid defeasance clause—Devisee's right not affected by a donee's alienation or compromise—Subsequent adoption by husband not divesting estate vested on wife's death.

A pre-nuptial settlement by a husband in favour of his wife was in the following terms: "I have given you the undermentioned properties and you may enjoy the same with full powers. If you have issue they shall enjoy it after our lifetime. If there be no issue after your death, your brothers should take the properties and enjoy them." Subsequent to the settlement in a litigation between the husband and wife in respect of settlement of properties, a razinama decree was passed whereby they divided the properties in certain shares to be enjoyed by them absolutely. The wife pre-deceased the husband who two months thereafter adopted a son. The wife's brothers claimed the properties under the gift-over clause on the ground that she died without issue.

Held, (1) that the estate settled upon the wife was an absolute one subject to defeasance on the happening of the specified contingency,

(2) that the defeasance clause was valid and operative and cut down the estate of the wife to a life-estate on the happening of the contingency.

6 M.I.A. 526, 9 M.I.A. 123 and 34 M. 250 followed.

59 C. 142 (P.C.) referred to.

31 I.C. 405 distinguished.

Distinction between repugnant clauses which are void and defeasance clauses which are valid pointed out.

(3) that the compromise by the wife being no more than an alienation could not be operative beyond her lifetime so as to affect the rights of the subsequent devisees, and

(4) that the subsequent adoption after the death of the donee does not operate to divest the estate vested in her brothers, as the contingency contemplated was only the death of the donee without issue at the time of her death.

B. Sitarama Rao and *J. R. Gundappa Rao* for Appellants.

S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for Respondents.

K.C.

Madhavan Nair, J. C.M.A. Nos. 176 and 177 of 1930.
2nd August, 1932.

Res judicata—*Execution proceedings—Application by judgment-debtor to raise attachment on ground of the lands forming part of service inams—Previous order by District Munsif in suits regarding another portion of the same survey number as forming part of no service inams—Application to Collector and his ruling that they were service inams—Whether Collector's order could prevail over Civil Court's previous order—Whether present application barred as* res judicata.

The properties belonging to the judgment-debtors formed part of a certain land alleged to be service inam. In two mortgage suits against them, their share in the land being the subject of mortgage was brought to sale. The decree not having been fully satisfied the judgment-creditor got a personal decree against the judgment-debtors and attached the remaining portion of the lands within the same survey number The judgment-debtors filed an application under S. 47, Civil Procedure Code, to set aside the attachment on the ground that the lands were service inam. There was a previous order of the District Munsif in the execution proceedings of the mortgage suit, when the judgment-debtors filed an application under O. 21, R. 90, Civil Procedure Code, to set aside the sale alleging that the properties sold formed part of the service inam, dismissing the application on the ground that the lands though once service inam had been enfranchised or resumed and hence sale was valid. After that order the judgment-debtors applied to the Collector under S. 13 of Act III of 1895 and the Collector gave a ruling that the properties were service inam. On the questions whether the previous order of the District Munsif prevailed against that of the Collector and whether it could bar the present application as *res judicata,*

Held, (1) that the applicants having submitted themselves to the Civil Court first could not contend that the Collector's order would prevail;

(2) that the previous decision of the District Munsif in regard to the lands forming part of the same survey number as not service inam owing to subsequent enfranchisement, barred the present application.

49 M.L.J. 401 relied on.

B. T. M. Raghavachari for Appellant.

K. Kottayya for Respondent.

K.C.

Sundaram Chetty, J. S. A. No. 1114 of 1928.
5th August, 1932.

Madras Estates Land Act (I of 1908), *Ss.* 55, 112, 146—*Jurisdiction—Civil Court.*

N.R.C.

Plaintiff, a transferee from a registered pattadar, and who did not get a transfer of the patta, brought a suit in a Civil Court for a declaration that proceedings taken by the landholder under S. 112 of the Madras Estates Land Act were valid only in so far as they related to the arrear of rent due on the actual extent of the land and not on the extent as mentioned in the patta, it being admitted that the actual extent was less than that mentioned in the patta, and prayed for an injunction restraining the landholder from taking proceedings for the full amount due as per the patta.

The landholder contended that such a suit would not lie in a Civil Court.

Held, that the principle governing the case of this kind is that if the plaintiff had an effectual remedy by a suit or an application in a Revenue Court for averting the injury complained of, he should resort to that remedy and not seek it by means of a civil suit. In this case the plaintiff as purchaser, though his purchase was not recognised, could have filed a suit under S. 55 for a grant of a patta in such terms as he would be entitled to receive. 44 Mad. 43 followed. Or the plaintiff could have applied under S. 146 for a transfer of the patta and if the transferor would not join in an application under S. 146 he could have filed a suit in a Civil Court and have produced an order of the Civil Court establishing the transfer.

The plaintiff not showing any cause for the omission to have recourse to these proceedings the principle of the decision in 42 M.L.J. 113 has to be applied and the plaintiff cannot ask for the reliefs in a Civil Court by means of a suit. The suit is not therefore maintainable.

M. Venkatasubbiah for the *Advocate-General* (*A. Krishnaswami Aiyar*) for Appellant.

P. Srikantam for Respondent.

K.C.

Venkatasubba Rao and Reilly, JJ. C. M. A. No. 445 of 1928.
5th August, 1932.

Mortgage—Suit upon simple mortgage—Appointment of Receiver—Simple money decree-holder purchasing the properties in execution of his decree subsequently—Receiver added as a party to his execution proceedings—Application by him for payment out of moneys in Court realised by Receiver for the period between date of his own purchase and the sale in execution of mortgage decree, whether maintainable.

In a suit for sale on a simple mortgage, the plaintiffs applied for appointment of a Receiver of the mortgaged properties and the Court appointed a Receiver to manage the properties and to pay the moneys realised into Court. Thereafter, a simple money decree-holder against the mortgagor who had already attached the mortgaged properties, applied to the Court for permission to add the Receiver as a party to his execution proceedings which was granted and in execution of his decree he purchased the properties. The plaintiffs in the mortgage suit added him as a party (9th defendant) to their suit; they applied for the continuance of the Receiver already appointed and for an injunction restraining the purchaser from taking possession till any decree that might be passed in the mortgage suit was satisfied and the applications were ordered. Subsequently a decree was passed in the mortgage suit and, in execution thereof, the properties were sold and the sale proceeds were not sufficient to discharge the mortgage decree. The 9th defendant applied for payment out to him of the moneys put into Court by the Receiver representing the income of the properties for the period between the date of his purchase and the date of sale in execution of the mortgage decree.

Held, that he was not entitled to the same on the ground that the order appointing a Receiver operated as an injunction restraining the judgment-debtor from himself receiving the moneys and that it prevented the debtor from dealing with them to the prejudice of the judgment-creditor and also prevented any subsequent judgment-creditor from gaining priority over the creditors obtaining the order.

(1903) 2 Ch. 727 followed.

22 Q.B.D. 187 distinguished as arising under the Bankruptcy Act under which all the properties of the debtor vest in the trustee.

Reilly, J. dissented from the statement in 47 C. 418 at 422 "Our attention has been invited to the case of *Penney* v. *Todd*[1] where it was ruled that the possession of a Receiver in a mortgaged suit was *prima facie* for the benefit of the party who had obtained the appointment. On this principle it has been argued that the Receiver

1. (1878) 26 W. R. (Eng.) 502.

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who was appointed at the instance of the first mortgagee holds the property for his benefit alone and is bound to make over to him the entire income for the satisfaction of his dues. In our opinion, this contention is clearly well founded."

The analogy of English cases dealing with mortgages should be used with care.

K. V. Sesha Aiyangar for Appellant.

K. Bhashyam Aiyangar and *R. Visvanatha Aiyar* for Respondents.

K.C.

Sundaram Chetty, J. S. A. No. 965 of 1930.
5th August, 1932.

Madras Local Boards Act (XIV of 1920), *S.* 88—*Lessee from inamdar landholder holding both warams—More a tenant than intermediate landholder—Landholder entitled to recover one-half of land cess payable by him from lessee.*

The lessee from the inamdar landholder holding both the warams must be deemed to be more a tenant than an intermediate landholder for the purpose of S. 88 of the Madras Local Boards Act of 1920 and the landholder is entitled to recover one-half of the land cess payable by him from the lessee.

M. Patanjali Sastri and *A. Nagaswami Aiyar* for Appellants.

V. Rajagopala Aiyar and *T. V. Ramiah* for Respondents.

K.C.

Krishnan Pandalai, J., C. R. P. No. 1413 of 1928.
15th August, 1932.

Promissory note—Simultaneous execution of note along with the advance of loan—Maintainability of the suit on the consideration—Evidence Act, S. 91.

Where a promissory note is inadmissible in evidence for want of proper stamp, and the loan has been simultaneous with the execution of the note, no suit can lie on the basis of the loan.

38 Mad. 660, 20 L.W. 943, C.R.P. No. 1486 of 1928 (unreported) and 1932 M.W.N. 793 followed.

40 Mad. 727, 34 I.C. 417 and 98 I.C. 75 explained.

S. Nagaraja Aiyar for Petitioner.

K. Balasubramania Aiyar and *K. Chandrasekhara Aiyar* for Respondents.

S.V.V.

Sundaram Chetty, J. S.A. No. 882 of 1928.
15th August, 1932.

Civil Procedure Code (V of 1908), *S.* 102—*Suit for refund of profession tax and for injunction to restrain future levy—Whether a suit of a small cause nature—Second appeal from such a suit, if competent—Madras Local Boards Act (XIV of* 1920), *S.* 93—*Business carried on at Rangoon—Owner resident within Devakottah Taluk Board area—When assessable to profession tax.*

Where the plaint in a suit for the recovery of a sum below Rs. 500 collected as profession tax, the levy of which was questioned as illegal, also prayed for an injunction to restrain the defendant, Local Board, from levying similar tax for two succeeding years and a separate Court-fee was paid for the relief of injunction, and in second appeal from such a suit the objection was taken that the suit was of a small cause nature and that a second appeal was incompetent under S. 102, Civil Procedure Code,

Held, that the relief of injunction prayed for in the plaint was substantial relief and not merely ancillary to the relief of refund, and as such, the suit was exempted from the cognizance of a Small Causes Court and that the second appeal was competent.

I.L.R. 30 Mad. 101 and A.I.R. 1930 A. 702 distinguished

Under S. 93 of the Madras Local Boards Act 1920, a person residing within the area of a Taluk Board can be assessed to profession tax under the second head of that section, only if he is in receipt within the Taluk Board area of the income in respect of which he is sought to be assessed.

I.L R 43 Mad. 75 (F.B.), I.L.R. 46 Mad. 706 (S.B.), I.L.R. 45 Bom. 1286 and 63 M.L.J. 148 followed

Watrap S. Subramania Aiyar for Appellant.

K. Rajah Aiyar for Respondent.

K.C.

Sundaram Chetty, J. C.R.P. No. 1147 of 1928.
15th August, 1932.

Madras Local Boards Act (XIV of 1920), *S.* 225—*Suit for refund of profession tax—Whether a suit for money had and received or a suit for compensation and damages—Period of limitation for such a suit—Whether six months or three years—Indian Limitation Act (IX of* 1908), *Art.* 62.

A suit for refund of profession tax illegally levied, is a suit for money had and received within the meaning of Art. 62 of the Limitation Act and not a suit for compensation or for damages.

I.L.R. 52 Mad. 207 referred to.

Section 225 of the Madras Local Boards Act provides only for suits for compensation or damages in respect of acts done by the Local Board or its officers and not for any other classes of suits.

N.R.C.

I.L.R. 32 Mad. 371 (F.B.) and 60 M.L.J. 600 followed.

A.I.R. 1930 All. 365 not followed.

K. Rajah Aiyar for Petitioner.

Watrap S. Subramania Aiyar for Respondents.

K.C.

Venkatasubba Rao and Reilly, JJ. C.R.P. No. 790 of 1931.
19th August, 1932.

Abatement—Hindu Law—Partition suit on behalf of a minor coparcener—Death of minor before preliminary decree—Suit if abates or can be continued by his legal representative.

Pending a suit for partition filed by an infant with his mother as guardian, the infant died before the preliminary decree was passed therein. The mother applied to be brought on record as legal representative of the son to continue the suit. On a difference of opinion between the Judges, Reilly, J., holding that the consensus of judicial opinion was that the suit abates and Venkatasubba Rao, J., that it does not and that as held by Jackson, J. in A.I R. 1930 Mad. 486, it can be continued by the mother if the Court should find that the suit when filed was for the benefit of the minor, the following questions were referred to a Full Bench:—

(1) Does a suit by a minor for partition abate if he dies before the Court has found that the partition is for his benefit.

(2) Or is it open to his legal representative to proceed with the trial and obtain a decree on his showing that when the partition suit was instituted it was for the benefit of the minor.

The scope and authority of precedents discussed by Reilly, J.

Case-law discussed.

S. Varadachariar and *B. T. M. Raghavachariar* for Petitioner.

G. Lakshmanna, G. Chandrasekara Sastri and *T. S. Narasinga Rao* for Respondent.

S.V.V.

Venkatasubba Rao and Reilly, JJ. C.M.A. No. 294 of 1928.
19th August, 1932.

Civil Procedure Code—Probate proceeding—Executor dying—If his sons can be added as legal representatives—Evidence Act, S. 41*—If a judgment against a will is a judgment* in rem.

An executor who was also a residuary legatee under the will applied for probate of the will. Caveat having been entered, the proceedings were contested and the first Court found against the will. Pending the appeal against it, the executor died and his sons applied to be brought on record.

Held, that the proceeding for grant of probate or Letters of Administration with a copy of the will annexed, is a representa-

tive one and the person who commenced it is to be regarded as having done so in his representative capacity and not in his individual capacity. The object in commencing the proceeding is to get an adjudication in the interests not only of himself but of others interested in it, that the will propounded is genuine and valid. O. 22 does not apply to such a proceeding but the son must be treated as coming in as one entitled to intervene in the proceeding at any stage of it. The position of a petitioner for probate is not dissimilar to that of a plaintiff under O 1, R 8, Civil Procedure Code.

36 Cal. 799 and 45 Cal 862 distinguished as only discussing the applicability of O. 22, R. 3 and not the larger right as intervenors.

9 Pat. 698 and 35 C.W.N 1028 approved, though on different grounds.

Williams on Executors, 12th Ed., Vol. I, p. 213 relied on.

The question whether or not a judgment of a Probate Court, pronouncing against a will, amounts to a judgment *in rem* under S. 41 of Evidence Act left open

16. Mad. 380; 38 Bom. 309; 12 C L.J. 91 and 12 C.L J 185 referred to.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *M. Venkatasubbiah* for Appellants.

S. Varadachariar and *R. Rajagopala Aiyangar* for Respondent.

S.V.V.

Jackson, Sundaram Chetty and Mockett, JJ. S.A. No. 1118 of 1929.

22nd August, 1932.

Minor—Sale of minor's properties by guardian—Covenant clause to re-sell property to vendor or his heirs—Whether suit for specific performance maintainable by minor.

Where the father of a minor acting as his guardian sold his (minor's) property to another person and the sale-deed contained a covenant to the following effect that "if it happens that you (vendee) or your heirs have to sell the property to others, then you must sell it to the vendor or his heirs for the above price" and the minor on attaining majority sued for specific performance of the contract,

Held, (1) that the covenant to repurchase by the vendor was a concluded contract and not a mere standing offer.

51 M. 533 (P.C.) relied on.

1931 M W.N. 957 and 46 M. 30 doubted.

(2) That the contract to repurchase was void for want of mutuality, the vendor being a minor on the date of the contract, and hence could not be specifically enforced by him on his attaining majority, irrespective of the transaction being beneficial to him.

39 Cal. 232 (P.C.) followed.

40 M. 308 (F.B.) referred to.

K. Desikachari for Appellant.

Salem Ramaswami Aiyar for *T. Appaji Rao* for Respondents.

K.C.

Sundaram Chetty, J. S.A. Nos. 334 and 470 of 1930.

23rd August, 1932.

Riparian rights—Water-course—Artificial water-course from a natural stream—Rights of owners of land on its banks—If can claim riparian rights—Second appeal—Fact—Interference in.

Where an artificial channel takes its source from a natural water-course, it does not follow that the owners of lands on both sides of the artificial channel *ipso facto* secure riparian rights over it. Special circumstances may be shown to exist, *e.g.*, grant, user, etc., so as to confer all such rights as a riparian owner would have had in the case of a natural stream. Unless the owners of land on the banks establish circumstances under which the artificial channel was made and the manner it was used so as to give rise to an inference that they have all the rights of riparian owners as such, it cannot be contended that by reason alone of the artificial channel having been cut from a natural stream, the former becomes a natural stream so as to confer riparian rights on them.

2 Exch. 1 (*Nuttall* v. *Bracewell*) discussed.

32 L.J.Q.B 136; 43 I.C 235; 51 Bom. 243 and 3 Rang. 494 distinguished as cases where such circumstances existed to confer riparian rights.

If by reason of a misconstruction of an important document the Courts below come to an erroneous finding on a question of fact, this Court can interfere in second appeal.

Ch. Raghava Rao for Appellant in S.A. No. 334 of 1930.

T. M. Krishnaswami Aiyar and *M. Appa Rao* for Appellant in S.A. No. 470 of 1930.

P. Venkataramana Rao and *K. Subba Rao* for Respondents.

S.V.V.

Sundaram Chetty, J. S. A. No. 72 of 1930.
23rd August, 1932.

Civil Procedure Code (*V of* 1908), *S.* 92—*Suit by co-trustee for scheme for management by rotation among the trustees—Kattalai trust—Will by founder—No direction therein for management by rotation—Sanction if necessary under S.* 92.

Under a will by the founder of a kattalai trust, the right of management was conferred on his male heirs but there was no direction as to management by the heirs. One of the trustees filed a suit for a declaration that he was entitled to joint management of the trust under the will and for a scheme of exclusive management by each trustee for one year by rotation. No sanction was obtained under S. 92, Civil Procedure Code, for the filing of the suit.

Held, that S. 92 was a bar to the maintainability of the suit in respect of the prayer for the scheme.

55 Cal. 519 at 529 (P.C.) relied on.

45 Mad. 113 at 116 (F.B.) referred to.

A. I. R. 1927 Mad. 948 distinguished as already containing a direction in the will for management by rotation and not given by Court in the exercise of its discretion.

B. Sitarama Rao with *K. Venkateswaran* for Appellants.

K. Desikachari for Respondent.

S.V.V.

Jackson and Mockett, JJ. C. M. A. No. 202 of 1929.
30th August, 1932.

Civil Procedure Code (*V of* 1908), *O.* 21, *R.* 2—*Applicability of—Decree for partition—Judgment-debtor to execute and give a sale deed, failing which to pay Rs.* 2,000—*Plea that sale deed executed—If barred.*

A decree for partition provided among other things that the judgment-debtor should get a conveyance of some property executed in favour of the decree-holder by a third party in whose name the property stood and give the sale deed to the decree-holder, and on failure to so give within a time, the judgment-debtor was to pay Rs. 2,000. There was also a decree for money. The judgment-debtor pleaded that he had executed and given the sale deed to the decree-holder.

Held, that the plea was one of an adjustment of the decree and must be certified even according to 49 Mad. 716 as there was also a money decree.

93 I.C. 369 doubted.

N.R.C.

Obiter approved 1928 Cal. 715, in preference to the Madras view in 43 Mad. 476 and 49 Mad. 716 and held that O. 21, R. 2 would apply to any decree whether there is a direction to pay money or not.

B. Somayya and *Kasturi Seshagiri Rao* for Appellants.

S. Varadachariar, S. V. Venugopalachariar and *P. Chandra Reddi* for Respondent.

K.C.

Krishnan Pandalai, J. C. M. A. No. 434 of 1930.
31st August, 1932.

Provincial Insolvency Act, S. 17—Debtor dying before adjudication—Subsequent adjudication of his "estate"—Proper form of —Official Receiver if can take proceedings under Ss. 53 and 54 for annulment of alienations.

A debtor against whom a petition had been filed to be adjudicated an insolvent died before adjudication. The proceedings were continued under S. 17, Provincial Insolvency Act and the Court adjudicated 'his estate' insolvent. The Official Receiver applied to annul certain alienations as void under Ss. 53 and 54 of the Act. It was resisted on the ground that it was an alienation by the debtor, that it was *his estate* that was adjudicated and therefore the Receiver in estate's insolvency had no *locus standi*.

Held, that the proper order was to have adjudged the deceased debtor insolvent and not his estate, that what the Court did must be treated to be an inadvertent mistake and read according to law. When a debtor against whom a petition in insolvency has been presented dies before adjudication and the proceedings are continued under S. 17 of the Provincial Insolvency Act, the Official Receiver or the creditors can invoke the power of the Court to set aside alienations under Ss. 53 and 54. The change of language in S. 17 was not intended to limit by a side wind the powers of the Court in insolvency when the debtor dies after petition but before adjudication.

51 Mad. 344 and 51 Mad. 495 followed.

T. R. Venkatarama Sastriar and *P. R. Srinivasan* for Appellant.

R. Krishnaswami for Respondent.

S.V.V.

Reilly, J. C.R.P. No. 781 of 1929.
29th August, 1932.

Civil Procedure Code (*V of* 1908), *S.* 151—*Unstamped document produced by plaintiff—Court's direction to him to pay stamp duty and penalty—Plaintiff succeeding in his suit—Application by plaintiff for inclusion of the stamp duty and penalty paid by him in the costs allowed him by Court—Whether Court could grant him the application.*

The plaintiff sued, as adopted son, for recovery of moneys due to plaintiff's father from defendant and the defendant raised among other pleas the plea that the plaintiff was not adopted at all by his father. An issue having been raised on that point, the plaintiff produced an adoption Muri in evidence. It having been unstamped, plaintiff was asked to pay stamp duty as well as penalty before it could be received in evidence. Subsequently plaintiff succeeded in his suit. He applied for the inclusion of the said stamp duty and penalty paid by him in the costs allowed to him and the Lower Court granted the application.

Held, that the Lower Court could not entertain the application under S. 151 of the Civil Procedure Code and still less to make defendant pay the stamp duty and penalty on plaintiff's document.

K. G. Srinivasa Aiyar for Petitioner.

M. Patanjali Sastri and *A. Sundaram Aiyar* for Respondent.

K.C.

Jackson and Mockett, JJ. C. R. Ps. Nos. 1195 to 1229 of 1931.
30th August, 1932.

Court Fees Act—Suit by inamdar to eject tenant—Tenant pleading kudivaram right—Court-fee payable under S. 7, cl. 11 (*cc*) *or S. 7, cl.* 4 (*c*).

In a suit by an inamdar claiming that he was entitled to both the melvaram and kudivaram and entitled to eject the tenant on the land as a tenant-at-will, the tenant pleaded that the plaintiff was entitled only to melvaram and that himself was entitled to occupancy rights. The plaintiff paid Court-fee under S. 7, cl. 11 (*cc*) of the Court Fees Act but the Lower Court held that S. 7, cl. 5 applied to the case.

Held, neither cl. 5 nor cl. 11 (*cc*) applied to the case but only S. 7, cl. 4 (*c*). Clause 11 (*cc*) is applicable when the suit is based on a lease but not when plaintiff also wants a decree establishing his title. 27 M.L.J. 475. Clause 5 (*c*) would apply to a case where plaintiff is suing to be put into possession of an inam against a rival claimant or trespasser and it cannot be that a plaintiff should pay the same Court-fee when he sues for possession of an inam against a rival claimant, and when as undisputed inamdar he asserts his title to kudivaram alone.

N.R.C.

S. Varadachariar for *N. Rama Rao* for Petitioner.

The Government Pleader for Respondents.

S.V.V.

Venkatasubba Rao and Reilly, JJ. C.M.A. No. 138 of 1929.
5th September, 1932.

Civil Procedure Code (*V of* 1908), *O.* 21, *R.* 90—*Auction purchaser—Application by purchaser to set aside sale—If competent—Purchaser if a person whose interests are affected by the sale.*

In a suit on a mortgage, a decree for sale was passed as prayed for. In copying the schedule of properties into the decree, some items were by mistake omitted and the mistake continued into the sale proclamation. *A* bought the property in Court sale under the impression that the omitted items also were sold, but as he found they were not in fact included, he applied alternatively to issue a sale certificate with the omitted items also or to set aside the sale.

Held, that he could not be given a sale certificate with the omitted items but that his application under O. 21, R. 90 to set aside the sale was competent, as he was a person "whose interests are affected by the sale" within the meaning of O. 21, R. 90.

38 M.L.J. 228 and 47 All. 479 followed.

S. Varadachariar and *S. V. Venugopalachariar* for Appellant.

D. Ramaswami Aiyangar for *C. S. Venkatachariar* and *K. S. Desikan* for Respondents.

K.C.

Venkatasubba Rao and Reilly, JJ. C.M.A. Nos. 110 & 111 of 1929.
7th September, 1932.

Civil Procedure Code (*V of* 1908), *S.* 47—*Auction purchaser—If representative of judgment-debtor—Cl.* (1) *of S.* 47 *if mandatory—Court if bound to inquire a matter falling within cl.* (1)—*Relative scope of cl.* (1) *and cl.* (2) *of S.* 47, *Civil Procedure Code.*

Section 47, cl. (1) is mandatory and the Court has no discretion to refer the *parties* to a separate suit for the determination of a question which falls properly under the section. Section 47, cl. (2) applies only to cases where the proceedings do not properly come under cl. (1) but are initiated wrongly under S. 47 instead of by a separate suit.

An auction purchaser in execution of a money decree against the judgment-debtor is his representative and can come in under S. 47 to object to a sale of the properties purchased by him when they are sought to be sold as the property of the judgment-debtor in execution of a decree obtained by another decree-holder who had already attached the same, prior to the petitioner's purchase. His petition to release the attachment cannot come under O. 21, R. 58 as the attachment was proper when it was made.

An objection by the attaching decree-holder that the decree and auction sale of the later purchaser are collusive and sham and that the properties continue to belong to the judgment-debtor must be investigated by the Court under S. 47, cl. (1) and the Court has no power to stop the sale and refer the decree-holder to a separate suit to establish the fraudulent character of the purchase.

S. Panchapakesa Sastri and K. R. Krishnaswami Aiyar for Petitioners.

S. R. Muthuswami Aiyar for Respondents.

S.V.V.

Sundaram Chetty, J. S.A. No. 1126 of 1930.
7th September, 1932.

Lessor and lessee—Lease deed—Benami plea—If open to lessee—Absence of consideration for lease.

It was agreed between the plaintiff and the 2nd defendant that the plaintiff should lease certain lands to the 2nd defendant but at their request the 1st defendant executed a lease deed in favour of the plaintiff for the said lands to prevent the creditors of the 2nd defendant from attaching the crops thereon. In a suit by the plaintiff against the 1st defendant for rent on foot of the lease deed,

Held, (1) that it was open to the 1st defendant to plead and prove absence of consideration for the covenant to pay rent by showing that he was never given possession under the lease deed, that the lease deed was a benami transaction and that possession was intended to be and in fact was only with the 2nd defendant, and

(2) that the delivery of possession to the 2nd defendant would not amount to consideration for the 1st defendant's covenant to pay rent as it was not alleged that possession was given to 2nd defendant at the request of the 1st defendant.

20 M.L.J. 144 followed.

B. Sitarama Rao for Appellant.

K. Srinivasa Rao for Respondent.

S.V.V.

Madhavan Nair, J. C.M.S.A. No. 247 of 1927.
8th September, 1932.

Civil Procedure Code (V of 1908), *S.* 47*—Minor's next friend—Direction in an award decree that the next friend shall file accounts in the Subordinate Judge's Court—Default—Defendant's petition to Court to call on next friend to account—If maintainable—Appeal against—Petition, if falls under S. 47, Civil Procedure Code.*

A suit by a minor was referred to arbitration and the award was made a decree of Court. The decree expressly provided that

the next friend of the minor shall file accounts of his management of the minor's estate into the Subordinate Judge's Court only. On failure to so file the accounts the defendant moved the Subordinate Judge to call on the next friend to file the accounts, which was dismissed on the ground that the proper Court was the District Court in whom the jurisdiction was vested under the Guardian and Wards Act.

Held, that the next friend was in no sense "party" to the suit within the meaning of S 47, Civil Procedure Code, and the appeal was therefore incompetent.

30 All. 55 followed.

V. Ramaswami Aiyar for Appellant.

S. Varadachariar and S. V. Venugopalachariar for Respondent.

K.C.

Madhavan Nair, J. C.M.S.A. No. 225 of 1927.
8th September, 1932.

Limitation Act, Art. 182, *cl.* (5)—*Uncertified payment—No petition in time to record payment—Execution petition filed more than* 3 *years from last petition but within* 3 *years of payment—Mere payment if a step-in-aid of execution.*

Mere payment, without an application to record it, filed within 3 years of the prior execution petition, cannot serve as a step-in-aid of execution so as to save limitation under Art. 182, cl. (5) of the Limitation Act, 1908. To serve as step-in-aid, there must be some application before the Court and mere payment outside Court will not suffice.

20 L.W. 190 followed.

41 Mad. 251 distinguished as a case under S. 20 of the Limitation Act which only requires proof of payment and not a step-in-aid of execution

2 Rang 393 also distinguished as a case where there was an application before Court in time.

K. Kuttikrishna Menon for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

S.V.V.

Jackson and Mockett, JJ. C.M.A No. 66 of 1930.
9th September, 1932.

Guardianship—Father—Second marriage—If disqualifies him from guardianship—Guardian and Wards Act, S. 19.

A father is not disqualified to be the guardian of his minor child by the first wife merely because he has married a second wife.

V. Govindarajachari for Appellant.

K. Kotayya with *S. Sitaraman* for Respondent.

S.V.V.

Bardswell, J. Cr. R. C. No. 203 of 1932.
6th September, 1932.

Criminal Procedure Code (*V of* 1898), *Ss.* 145 *and* 147—*Claim to do* pooja *as* poojari *of temples—Action under S.* 145—*Sustainability—Status of hereditary* poojari.

The claim to do *pooja* in certain temples as the hereditary *poojari* thereof can be the subject-matter of proceedings under S. 145, Criminal Procedure Code, and no separate consideration of the question is necessary under S. 147 of the Code Observations of Ayling, J., in 34 I.C. 651 relied on.

A hereditary *poojari* is also a servant of the temple trustee and his possession is for and on behalf of the latter. 35 Mad. 631 (F.B.) relied on.

A. V. Narayanaswami Aiyar for Petitioner.

K. S. Jayarama Aiyar and *K. G Srinivasa Aiyar* for Respondent.

The Public Prosecutor on behalf of the Crown.

B.V.V.

Jackson and Mockett, JJ C.M A. No. 376 of 1929.
9th September, 1932.

Civil Procedure Code (*V of* 1908)—*Minor—Guardian* ad litem —*Compromise by, in execution proceedings—Adjustment if requires sanction of the Court—O.* 21, *R.* 2 *and O.* 32, *R.* 7, *Civil Procedure Code.*

In view of the fact that 35 C L.J. 9, A I.R. 1926 Lah. 290 and A.I.R. 1927 Cal 930 are contrary to 29 Mad. 309 and as the authority of 29 Mad. 309 seems to be much shaken by 55 Mad. 17 (F.B.), their Lordships referred the question "whether 29 Mad. 309 is still good law that leave of the trial court is necessary for a minor's compromise after the decree and in execution" to a Full Bench.

K. V. Sesha Aiyangar for Appellant.

P. Vedachala Aiyar for Respondent.

S.V.V.

Madhavan Nair, J. C.C.C.A. No. 55 of 1930.
13th September, 1932.

Res judicata—*New information received after time for reviewing the prior decree passed—Subsequent suit, if barred—Suit by beneficial owner in possession—Section 66, Civil Procedure Code, if bars the plea of benami.*

Where a party relies on the same title in both the suits, merely saying that he has come across a new piece of information, would not entitle him to litigate a second time the validity of that title. New information is a ground for review under O. 47, Civil Pro-

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cedure Code and cannot be urged in a separate suit. Even if time for review has expired, S. 5 can be invoked in aid.

The question, how far a suit by a beneficial owner in possession for a declaration of his right to the property against a purchaser in Court-auction whose purchase is certified under S. 66 is maintainable, left open.

V. Visvanatha Sastri for Appellant.

S. B. Satya Nadar, E. R. Balakrishnan and *N. C. Rangasvami* for Respondent.

S.V.V.

Jackson and Mockett, JJ. C. M. A. No. 258 of 1930.
13th September, 1932.

Civil Procedure Code (*V of* 1908), *O* 21, *R.* 89—*"Received by decree-holder" in cl.* (b)—*Meaning of "received"—Moneys in deposit if "received" by decree-holder.*

In execution of a decree, certain properties were sold in lots under one proclamation, and amounts were deposited by purchasers under the earlier sales into Court. Another lot was later sold and the judgment-debtor deposited into Court the balance of the decree amount, the 5 per cent on the last lot's price and poundage. He claimed to be entitled to deduct the amounts in Court deposit. The prior sales were not confirmed by then.

Held, that "received by the decree-holder" means actual receipt and mere deposit in Court under the circumstances was not enough. The deposit of the balance was therefore not in accordance with R. 89.

S. V. Venugopalachari for Appellant.

M. S. Venkatarama Aiyar for Respondent.

K.C.

Jackson, Sundaram Chetty and Mockett, JJ. C. M. As. Nos 51 and 52 of 1929.
14th September, 1932.

Limitation Act (*IX of* 1908), *S* 15 *and Art.* 182—*Decree for sale—Suit by third party claiming properties as his and not the judgment-debtor's—Time taken by suit if can be deducted—Equitable considerations, if permissible—Prior application dismissed for non-payment of batta—Subsequent application, if can revive the old application.*

A final decree for sale of the mortgaged properties was passed in 1922 and six months after the decree, the decree-holder filed E. P. No. 57 of 1922 for sale of the properties but it was dismissed by Court on 16th January, 1923, expressly on the ground of non-payment of batta for sale. In 1919 one *M,* a third party, filed a suit impleading the decree-holder and mortgagors as party-defendants contending that the mortgaged properties belonged to a

mosque, were inalienable and therefore the decree in the mortgage suit was invalid. This suit was decreed by the Trial Court on 15th January, 1923. The mortgagee appealed and had it reversed in his favour on 6th August, 1927. About a month after that, on 23rd September, 1927, he filed a fresh execution petition in his mortgage suit for sale of the properties.

Held, the second execution petition was barred by limitation being more than three years from the dismissal of the first execution petition.

Though O. 9 and O. 17, Civil Procedure Code, do not apply to execution proceedings, still the Court has inherent power to dismiss an application for execution, when the applicant makes default in the payment of batta. The dismissal of E. P. No. 57 was proper and an application for execution which has been finally and properly dismissed cannot be revived. There should have been no final disposal or there should have been a wrong dismissal on account of some obstacle which then existed but which was subsequently removed, in order to entitle the applicant to have the later application treated as one in continuation of or to revive the former one.

21 Mad. 257 and 95 I.C. 718 followed.

21 Mad. 261, 28 Mad. 250 and 27 All. 334 distinguished as cases where no final order was passed.

31 Mad. 71, 47 Mad. 176 distinguished as a case of wrong order.

The time taken in the appeal against the mosque decree cannot be deducted under S. 15. The words in S. 15 are "stayed" and not "inconvenienced". It cannot be said that the series of cases from 7 M.I.A. 238 to 43 Cal. 660 have superimposed upon the Limitation Act some equitable provision which finds no place in its sections. "Suppose in a similar case the mortgagor was possessed of much properties besides the mortgaged property. The decree-holder could put in his application for execution, sell the property with the blot on the title for what it is worth or have it recorded that the property was legally extinct (*see* 50 Cal. 710) and then apply for a personal decree; and to say that in these circumstances execution has been stayed is to wrest the expression entirely away from its ordinary meaning."

76 I.C. 557 and 82 I.C. 1 followed.

50 Mad. 417 approved.

53 M.L.J. 520 not followed.

43 Mad. 185 discussed and distinguished.

5 Pat.L.J. 39, 47 I.C. 907, 23 Cal. 775 and 12 M.I.A. 244 distinguished.

Per Mockett, J.—For the application of S. 15 of the Limitation Act, the injunction or order must be express in its terms and

cannot be implied. There is no room for equitable considerations in construing the Limitation Act.

53 M.L.J. 329 relied on.

N. Sivaramakrishna Aiyar for Appellant.

Ch. Raghava Rao, A. Sundaram Aiyar and *V. Krishna Mohan* for Respondent.

S.V.V.

Bardswell, J. C. M. Ps. Nos. 4040 and 4335 of 1932
15th September, 1932.

Writ of certiorari—Election dispute—Madras District Municipalities Act—Scope of election petition enquiry—Erroneous decision of election officer—Decision on an objection not taken before him—Illegal—Certiorari, scope of.

The Subordinate Judge of Vellore hearing objections on election petitions under District Municipalities Act is a *persona designata.* A disqualification under S. 49 of the Act can be made a ground for a petition before the election officer impugning the election. The officer has got jurisdiction to hear and decide objections raised under the section and the High Court will not interfere by writ of certiorari, merely because his interpretation of S. 49 is erroneous.

62 M.L.J. 644 and 52 Mad. 732 followed.

None of the cases, 4 A.C. 30, (1924) 1 K.B. 171, (1910) 2 K.B. 165, (1922) 2 A.C. 128, 5 P.C 417, (1926) 2 K.B. 192 or (1930) 2 K.B 215 is an authority for the position that an erroneous decision on a point of law, by a Court acting within the limits of its jurisdiction can be quashed by a writ of certiorari.

But when a Court or similar authority gives to itself a jurisdiction which it properly has not got by taking an erroneous view of the law, a writ will be issued. As the election officer has no jurisdiction to decide except on the objections raised before him, an order based on an objection not taken before him is illegal and will be quashed by certiorari.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *D. Krishnaswami* for Petitioner in C. M. P. No. 4040 of 1932.

S. Srinivasa Aiyangar, S. Parthasarathi and *V. K. Tiruvenkatachari* for Petitioner in C. M. P. No. 4335 of 1932.

T. M. Krishnaswami Aiyar and *M. S. Venkatarama Aiyar* for Respondents in both.

S.V.V.

Jackson and Mockett, JJ. C. M. A. No. 480 of 1929.
16th September, 1932.

Res judicata—*Principle of—If applicable to insolvency proceedings.*

Though S. 11, Civil Procedure Code may not in terms apply, the principle underlying the rule of *res judicata* applies also to insolvency proceedings.

11 A.C. 37, 48 Cal. 499 and 45 Mad. 320 followed.

T. R. Ramachandra Aiyar for *G. Musalappa Reddy* for Appellant.

S. Ranganadha Aiyar and *T. R. Arunachalam* for Respondent.

S.V.V.

Jackson and Mockett, JJ. C. M. A. No. 217 of 1930.
16th September, 1932.

Civil Procedure Code (V of 1908), *S.* 47 *and O.* 20, *R.* 9—*Compromise decree—Decree for immovable property—Properties not specified by boundaries, etc.—If O.* 20, *R.* 9 *avoids the compromise.*

In a suit between a brother and sister, the sister suing for her share in patrimony, a compromise decree was passed under which the sister was to get 160 acres, the lands to be selected by her as she pleased. She indicated the lands and the brother gave them to her, but whether he actually gave over possession of them or not was not clear. The brother became an insolvent and in execution the sister called on the Official Receiver in his insolvency to give her a document specifying the lands.

Held, that the case fell under S. 47 and no suit would lie. Therefore the question must be decided by the Court executing the decree.

Order 20, Rule 9, Civil Procedure Code, does not apply to the case as it is only a precept for Courts in drawing up decrees in suits for immovable property. But the rule does not necessarily avoid the terms of a decree based upon a compromise and the decree is therefore executable.

V. Govindarajachari for Appellant.

P. Somasundaram for Respondent.

S.V.V.

Madhavan Nair, J. C. M. S. A. No. 234 of 1927.
19th September, 1932.

Limitation Act (IX of 1908), *S.* 19 (2)—*Insolvency of judgment-debtor—Schedule containing acknowledgment—Date being stroked out—Evidence as to date of acknowledgment—Admissibility.*

Where the judgment-debtor became insolvent and the schedule of assets and liabilities filed by him contained an acknowledgment of liability as regards the suit claim but the schedule contained a date that had been stroked out, which if taken into account would bar the later execution application,

Held, that for purposes of S. 19 (2) of the Limitation Act the writing containing the acknowledgment should be taken to be undated and evidence may be given as to its correct date.

26 Bom. 128 disapproved.

K. V. Venkatasubramania Aiyar for Appellant.

E. Vinayaka Rao for Respondent.

B.V.V.

Sundaram Chetty, J. S. A. No. 484 of 1929.
20*th September*, 1932.

Religious office—Archaka murai *in temple—Alienation for pecuniary advantage of holder—Custom permitting transfer—Validity.*

A transfer of a religious office, such as an archaka ***murai*** in a temple, made for the pecuniary advantage of the holder is invalid even if sanctioned by the usage of the institution. A religious office and its emoluments are ***extra commerciam*** and cannot be permitted to be dealt with as private property.

1 Mad. 235 (P.C.) relied on.

Dictum of Sadasiva Aiyar, J. in 38 Mad. 850 approved.

42 Cal. 455 not followed.

T. M. Krishnaswami Aiyar and *B. V. Viswanatha Aiyar* for Appellant.

S. T. Srinivasagopalachari for Respondent.

S.V.V.

Ramesam and Pakenham Walsh, JJ.
16th September, 1932.

C. M. Ps. Nos. 6459 of 1931, 5155 of 1930, 2310 of 1931 and 2074 of 1932.

Writ of Certiorari—Jurisdiction to issue—Distinction between "administrative" and "judicial" acts—Proceedings of Revenue Board under Chap. XI, Madras Estates Land Act, 1908*—If can be quashed by High Court—Appeal under S.* 171*—Absence of notice to respondent—If legal—Pannai lands—If come under the Act—S.* 172*—Board if can revise or direct revision.*

The High Court has power to issue a writ of certiorari to quash the proceedings of the Revenue Board under such provisions of Chap. XI as are to be exercised "judicially" and not "ministerially or administratively". A tribunal may not be a Civil Court but yet may act "judicially". An executive body may discharge judicial functions also and an executive act may also partake of a judicial character. The Full Bench in 63 M. L. J. 450 was only considering whether the Revenue Board was a Civil Court and not the further question whether they were in any sense a judicial tribunal in the sense required for issuing a writ of certiorari. Though the main purpose of the functions of a revenue officer is to carry out an executive act, viz., the preparation of the record-of-rights including settlement of rent, parts of his duties are undoubtedly of a judicial character and to this extent those functions partake of the character of acts of a judicial tribunal. (1906) 2 K. B. 501. A settlement of rent between landlord and tenant cannot be said to be purely ministerial. (1911) A. C. 179. The mere fact that the tribunal can rely on its experience cannot make the act any the less a judicial one.

(1924) 1 K. B. 171, (1926) A. C. 586 and (1929) 1 K. B. 619 relied on.

(1931) A. C. 275, 53 Mad. 979, 55 Mad. 107 and 60 M. L. J. 260 distinguished.

Unless the Court is satisfied that irregularity of procedure has led to some substantial injury, the writ will not be issued.

In respect of the issue of notice and hearing parties the language of S. 171 of the Estates Land Act is in marked contrast to that of Ss. 169, 170 and 172 and therefore the Board's acts under S. 171 without notice to the party affected by it (respondent where appeal is allowed) is not *ultra vires*, though it is proper and desirable to hear the party to be so adversely affected.

All pannai lands are excluded from the Estates Land Act and no record-of-rights can be made with regard to them. The question whether a land is pannai or not must be decided before the

N. R. C.

record is made and cannot be left open. Failure to enquire into it is a failure to exercise jurisdiction and a writ can, therefore, be issued.

Per Ramesam, J.—The words 'Direct the revision' in S. 172 cannot enable the Board itself to proceed to revise the record. It can only mean that it should direct the revision by some other officer and that other officer can only be the Revenue Officer who made the original settlement and not the confirming authority under S. 170 or the Superior Revenue Authority under S. 169.

S. Varadachariar for *K. S. Champakesa Aiyangar* for Petitioner in C. M. P. No. 6459 of 1931.

B. Jagannadha Doss, reporting no instructions, for Respondents in C. M. P. No. 6459 of 1931.

S. Varadachariar and *A. Swaminatha Aiyar* for Petitioner in C. M. P. No. 5155 of 1930 and Respondent in C. M. Ps Nos. 2310 of 1931 and 2074 of 1932.

Watrap S. Subrahmania Aiyar for Petitioner in C. M. P. No. 2074 of 1932 and Respondents in C. M. P. No. 5155 of 1930.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Petitioner in C. M. P. No. 5155 of 1930.

P. Venkataramana Rao (Government Pleader) for the Revenue Board in all cases.

S. V. V.

Jackson and Mockett, JJ. L. P. A. No. 29 of 1927.
20th September, 1932.

Hindu Law—Joint family—Coparcener alienating his share—Alienating coparcener's death—Subsequent suit by the surviving coparcener for partition—Alienee's position—If entitled to the share of the properties as it existed at the time of alienation or at the date of suit.

Two brothers constituted a joint Hindu family and one of them alone alienated a parcel of family land and put the alienee in possession of it. The rest of the family property was dissipated and then the non-alienating brother sued for partition and possession of his half share in the land. At the time of the alienation, this was less than alienor's half share and it was contended that the alienee was entitled to his alienor's share as it stood at the date of the alienation and that therefore the suit must fail. It was held by Devadoss, J., in Second Appeal following 35 Mad. 47 and 46 Mad. 815 that the alienee cannot be disturbed.

Held, reversing Devadoss, J., that on principle the alienee literally buys only the right that his vendor has and that is his right

of partition subject to the contingency of fluctuation in a joint Hindu family by births, deaths, etc. An exception has been recognised in the case where the alienor dies and then the alienee though logically should get nothing, is given the share as at the date of the alienation. 35 Mad. 47. But that cannot be extended further. It only laid down that the quantum or fraction of the share is to be computed as at the date of the alienation. But as regards the properties to be partitioned, the alienee is entitled to take the family property as on the date of the suit for partition and the Courts cannot embark on an enquiry as to the properties at the date of the alienation. This is more equitable as the alienee has only to thank himself if, by delaying his right to partition, he finds his security diminished.

14 Mad. 408 (F. B.) and 38 Mad. 684 followed.

35 Mad. 47 and 46 Mad. 815 doubted and distinguished.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Appellant.

T. M. Ramaswami Aiyar for Respondent.

S. V. V.

Krishnan Pandalai, J. C. M. A. No. 375 of 1932.
21st September, 1932.

Receiver—Mortgage suit—Simple mortgage—Personal remedy expressly given up—Receiver, if can be appointed.

Where in a suit upon a simple mortgage, the mortgagee expressly gave up his personal remedy,

Held, no receiver could be appointed either on the ground that security is diminishing in value on account of fall in the market or that the mortgagor does not pay interest or for any other such reason. In such a case the security extends merely to the corpus and not to its future income. Unless the personal remedy is subsisting, to appoint a receiver will be to enlarge the mortgagee's security or enlarge his rights to the prejudice of third parties who have acquired rights in equity of redemption.

29 M. L. J. 457, 14 C. L J. 526 and 1925 M. W. N. 802 followed.

100 I. C. 735 not followed.

13 C. L. J. 495, 17 I. C. 202, 52 Mad. 979 and 1929 Mad. 184 distinguished.

54 Mad. 565 doubted in so far as it gives a preferential right to the mortgagee.

Leave to appeal granted.

K. S. Ramabhadra Aiyar for Appellant.

K. V. Sesha Aiyangar for Respondent.

S. V. V.

Sundaram Chetty, J. S. A. No. 3 of 1930.
27th September, 1932.

Civil Procedure Code (*V of* 1908) *—Practice—Suit against* A *and* B *for alternate relief—Suit decreed against* A *but dismissed against* B*—Appeal by* A*—*B *not impleaded—Plaintiff if can apply to add* B *as a respondent—O.* 41, *Rr.* 20, 33 *and O.* 1, *R.* 10, *Civil Procedure Code.*

A suit was brought against *A* and *B* for relief against *A* or *B*. The suit was decreed against *A* but dismissed as against *B*. *A* alone appealed impleading only the plaintiff as respondent and omitting to implead *B*. Before the hearing of the appeal but after service of notice on the plaintiff, he applied to add *B* as a party respondent, so that if on appeal *A* be exonerated, he may have his claim against *B* adjudicated on.

Held, that *B* can be added as a party. No question of limitation can arise as the plaintiff could not have appealed against *B* so long as the decree against *A* was subsisting. The words "interested in the result of the appeal" in O. 41, R. 20 mean interested in the result of the appeal including memo. of objections, etc., 11 L. W. 602; and as a memo. of objections could have been filed against *B*, the Court could act under R. 33 even in the absence of a memo. of objections.

Even if O. 41, R. 20 did not cover the case, the addition could be made under O. 1, R. 10 read with S. 107.

58 Cal. 923 not followed as contrary to 11 L. W. 602.

6 Rang. 29 (P. C.) and 9 Rang. 624 distinguished as cases where the plaintiff was the appellant and the party sought to be added who was a necessary party could have been impleaded in the appeal in the first instance.

82 I. C. 600 followed.

K. Rajah Aiyar, V. Ramaswami Aiyar and *K. S. Rajagopalachari* for Appellant.

S. Varadachariar for *K. S. Champakesa Aiyangar* for Plaintiff-respondent.

A. V. Narayanaswami Aiyar for Party-respondent

S. V. V.

Mockett, J.
27th September, 1932.

C. R. P. No. 1383 of 1929.

Evidence Act (I of 1872), *S.* 32 (2)—"*Books kept in the ordinary course of business*"—*Meaning of*—*Case of "no evidence"*—*If interference under S.* 115, *Civil Procedure Code, possible.*

The principle underlying the exception in S. 32, cl. (2) to the rule that hearsay evidence is inadmissible is that what a man writes down as a necessary incident of daily or regular business routine is likely to represent the facts and it will be dangerous to extend it to a case where there was no business transacted by the deceased man but a book was maintained by him with casual entries representing his private affairs. For the application of the section there must be (1) some business or habitual engagement in which the deceased was occupied, (2) the book should be kept for that purpose, and (3) the entry should be made in the book according to the usual routine.

23 Bom. 63 followed. Where the Court decides relying on inadmissible evidence and omitting that, there is no evidence to support the judgment, the case is one of material irregularity under S. 115, Civil Procedure Code.

9 All. 398 followed.

S. Jagadisa Aiyar and *S. Nagaraja Aiyar* for Petitioner.

M. S. Venkatarama Aiyar for Respondents.

S. V. V.

The Chief Justice,
Ramesam, Sundaram
Chetty, Pakenham
Walsh and Burn, JJ.
28th September, 1932.

O. P. No. 243 of 1931.

Income-tax—*Mutual Benefit Societies*—*Income earned by*—*If profits assessable to tax*—*Payment of guaranteed interest to subscribers*—*If an allowable deduction.*

The Madura Permanent Fund returned an income of Rs. 14,000 and odd as liable to tax claiming a deduction of Rs. 68,000 odd as interest paid on borrowed capital relying on I. L. R 47 M. 1. On a case being stated,

Held, that this fund and similar funds are not companies but really mutual societies dependent upon the subscribed capital of their members. The capital of the funds though called share capital is not really so. In questions arising under the Income-tax Acts, the registration under the Companies Act is not conclusive. The capital which is fluctuating from time to time is more in the

nature of a loan by the subscribers to the Fund. If this is regarded as share capital, it will mean that the sanction of the Court should be obtained for each subscriber being re-paid and that will render the Funds unworkable. The subscriber may be entitled to sue the Fund like any other lender advancing money to a partnership in respect of the capital. S. 10 (2), (3) shows that the legislature intended to regard guaranteed interest as interest payable on borrowed capital and the deduction was therefore allowable.

14 A. C. 381 (*Style's case*) distinguished as a case of a division of surplus arising by over-estimate.

47 Mad. 1 and 3 I. T. C. 385 referred to and discussed.

S. Srinivasa Aiyangar, K. Rajah Aiyar, V. Ramaswami Aiyar, K. S. Rajagopalachari and *S. Venkatachallam Aiyar* of Madura Bar for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

S. V. V.

Madhavan Nair, J.
28th September, 1932.

C. M S. A. No. 217 of 1927.

Provincial Insolvency Act (V of 1920), S. 54—Mortgage—Application to set aside—Filed more than three months from execution but within three months of registration—S. 54 applied—S. 53 if applies where mortgage in favour of a creditor.

A mortgage was executed on 9th March, 1922, but was registered only on 9th June, 1922. The insolvency court having jurisdiction over the mortgaged properties closed on 9th May, 1922 and re-opened on 10th July, 1922. On a petition presented on 10th July, 1922, the debtor was adjudicated an insolvent, the act of insolvency alleged being this mortgage itself. The Official Receiver applied under Ss. 53 and 54 of the Provincial Insolvency Act for setting aside the mortgage. On a contention being raised that the mortgage being more than three months prior to the date of adjudication, S. 54 did not apply.

Held, that by virtue of S. 59, Transfer of Property Act, the mortgage becomes a valid mortgage only on registration; that therefore for S. 54 of the Provincial Insolvency Act the date of registration is the crucial date.

Held, further, that though the mortgage was in favour of a creditor, it can also be questioned under S. 53.

K. V. Krishnaswami Aiyar for Appellant.

R. Krishnaswami for Respondent.

S. V. V.

Madhavan Nair, J. C. M. S. A. No. 91 of 1928.
3rd October, 1932.

Provincial Insolvency Act (V of 1920), *Ss.* 43 *and* 37.(2)—*Insolvent not applying for discharge in time—Subsequently devolved properties—Official Receiver, if can sell—Annulment of adjudication, if automatic on expiry of time for discharge.*

An insolvent did not apply for discharge within the time fixed by the Court for the purpose, nor was any application made to the Court for extension of the time. Subsequently some properties devolved on the insolvent after the time for discharge had expired. The Official Receiver proceeded to sell them. On its being contended that the Official Receiver had no power to sell them,

Held, that S. 43 states that the adjudication "shall be" annulled and not that it " shall stand " annulled. This, as also the language of S. 37 (2), clearly indicates that there should be an order of Court formally annulling the adjudication. In the absence of an order to that effect, the insolvent continues to be undischarged and the Official Receiver's right to sell the properties continues.

53 Mad. 288 (F. B.) and 52 Mad. 648 relied on.

R. Gopalaswami Aiyangar for Appellant.

K. S. Desikan for Respondent.

S. V. V.

Venkatasubba Rao and Reilly, JJ. C. M. A. No. 226 of 1932.
3rd October, 1932.

Provincial Insolvency Act (V of 1920), *S.* 52—*Order under—Whether appealable—Section whether applies to cases where there is no attachment of property in execution of decree.*

No appeal lies against an order passed under S. 52 of the Provincial Insolvency Act by an Interim Receiver.

S. 52 of the Provincial Insolvency Act has no application to a case where the property is not attached in execution of a decree; it has only application to cases where the property is held in *custodia legis* by attachment or otherwise.

55 Mad. 316 distinguished.

T. R. Venkatarama Sastri and *K. P. Mahadeva Aiyar* for Appellant.

C. A. Seshagiri Sastri and *K. S. Desikan* for Respondent.

K. C.

Madhavan Nair, J. C. R. P. No. 365 of 1932.
4th October, 1932.

Court Fees Act (VII of 1870 *as amended by Madras Act V of* 1922), *S. 7 iv-A and v—Suit for cancellation of sale deed and for possession—Court-fee payable.*

The plaintiff sued for the cancellation of a sale deed executed by her and for recovery of possession of land with mesne profits. The plaintiff paid court-fee for the cancellation of the sale deed on the amount of the consideration mentioned in the sale deed and also paid court-fee on the mesne profits.

Held, that the claim with respect to possession was only ancillary to the main claim, namely, setting aside the sale deed and that separate court-fee need not be paid in respect of the claim for possession of the property.

49 M. L. J 608 and 36 L. W. 225 referred to.

K. S. Desikan for Petitioner.

K. S. Champakesa Aiyangar for Respondent.

B. V. V.

Jackson and Pakenham Walsh, JJ. L. P. A. No. 46 of 1927.
4th October, 1932.

Custom—Hindu inhabitants of village—Right to perform ceremonies and go round peepul tree—Acquisition by custom—Finding as to custom—Interference in second appeal—Civil Procedure Code, 1908, *S.* 100.

The right to perform certain ceremonies at the foot of a peepul tree and to perform *pradakshanam* round the tree can be acquired by the Hindu residents of a village by force of custom. The inhabitants of the village are sufficiently definite for that purpose and the fact that other persons with or without right claim the same privilege by force of custom is immaterial.

61 I. C. 132 relied on.

The existence of a custom or usage having the force of law is a mixed question of fact and law. S. 100, Civil Procedure Code, precludes the High Court from interfering in second appeal with the finding arrived at by the Lower Court of actual facts from which the existence of the custom has been inferred.

41 Mad. 374 followed.

T. R. Ramachandra Aiyar and *V. Subramania Aiyar* for Appellant.

K. Kuttikrishna Menon and *P. A. Krishnakutti Nair* for Respondents.

B. V. V.

Krishnan Pandalai, J. C. M. A. No. 160 of 1932.
4th October, 1932.

Civil Procedure Code (V of 1908), *O.* 23, *R.* 1—*Prior suit against brother for a declaration of joint status—Death of defendant brother pending suit—Withdrawal of suit—Subsequent suit against brother's widow for possession as sole surviving coparcener —If barred.*

One of two coparceners sued the other for a declaration that they were members of a joint family and that certain properties claimed by the defendant as his own belonged to the joint family. The plaint did not, however, seek partition. The defendant having died pending the suit, the plaintiff withdrew that suit without bringing the defendant's widow on record as his legal representative. The present suit was filed by the same plaintiff against the widow of the deceased claiming to recover possession of the whole property as sole surviving member of the joint family.

Held, that the second suit was not barred under O. 23, R. 1, Civil Procedure Code, by reason of the withdrawal of the former suit, as the second suit was not based on the same cause of action as the first.

39 Mad. 987 (F. B) referred to and followed.

The mere fact that even in the former suit the plaintiff might, on the defendant's death, have applied to amend his plaint and claimed possession of the whole property would not conclude the present question.

Case-law discussed.

T. R. Venkatarama Sastriar and *C. A. Seshagiri Sastri* for Appellants.

S. Varadachariar and *A. Parameswaran* for Respondent.

S. V. V.

Sundaram Chetty, J. S. As. Nos. 3 and 1082 of 1930.
11th October, 1932.

Mahomedan co-heirs—One co-heir transferring property (mortgage debt) on behalf of another minor co-heir as guardian—Validity of—Suit on mortgage by transferee—Sale thereon—Purchase by a stranger—Mother guardian of minor to suit also—Mother ex parte—*Gross negligence—Decree not binding—Suit by minor to recover his share—Purchaser in Court sale not liable—Transferee or mortgagee liable—Prior suit if* res judicata.

On the death of a Mahomedan, his widow and minor daughter succeeded to his property as co-heirs Amongst the properties so inherited was a mortgage debt which the widow acting for herself and as guardian of her minor daughter assigned to *A* who in turn assigned the same to *B*. *B* sued to enforce the mortgage making the mother and the minor daughter party defendants to that suit,

N. R. C.

the mother herself being nominated guardian *ad litem* of her minor daughter. The mother did not appear at the trial to claim that the alienation of the minor's interest was void under the Mahomedan Law and the Court holding that *B* was entitled to enforce the mortgage gave him a decree for sale. The mortgaged properties were purchased in the Court sale by a third party The minor daughter after attaining majority sued to recover her share of the mortgage debt either by sale of the hypotheca or from *B*.

Held, that the assignment of the daughter's interest in the mortgage by the mother was void in law; but as it cannot be said that the daughter was not at all represented in *B's* suit, the Court had jurisdiction to direct the sale of the mortgaged property for the whole debt and a third party purchaser was not bound to go behind the Court's decree and enquire whether or not the daughter's interest passed to *B* or whether the mother could have been appointed as guardian *ad litem* or conducted the defence properly on behalf of the minor. The daughter had therefore no right to proceed against the hypothecated property in the hands of the purchaser.

Held, further, that the daughter could claim to recover from *B* her share of the amount realised by him under the decree in his suit. *B* was really in the position of a co-owner as the mother's share had vested in him and the case therefore fell under S. 90 of the Trust Act. An action for money had and received would also lie on the ground that a person who had realised moneys under a void assignment was in equity bound to refund the amount to the assignor.

30 Mad. 459 followed.

41 Mad. 923 distinguished on the ground that in that case the assignee from one partner purchased the whole debt in the belief that his assignor was exclusively entitled to the whole debt and he could not therefore be held to stand in a relationship of co-owner or other privity known to law towards the partners of his assignor, whereas in the present case the assignment expressly purported to be of the respective rights of the mother and the daughter.

Held also that the decision in *B's* mortgage suit would not bar the daughter from pleading that the assignment of her share was not binding on her. Though the mother as guardian *ad litem* could have raised this plea in that suit, she was guilty of gross negligence in not doing so and hence the minor could not be barred.

K. Rajah Aiyar and *K. S. Rajagopalachari* for Appellant.

S. Varadachariar for *K. S. Champakesa Aiyangar* for Respondent.

A. V. Narayanaswami Aiyar for Party Respondent (added as per order noted in 63 M. L. J. (N. R. C.) p. 30).

S. V. V.

Jackson and Mockett, JJ. C. M. A. No. 122 of 1930.
12th October, 1932.

Restitution—Court's powers to—S. 151 *if can be invoked apart from S.* 144, *Civil Procedure Code.*

The appellant bought certain property at a revenue sale on 20th June, 1918 The sale was cancelled and thereon a suit was filed to declare the cancellation to be erroneous. There was a prior mortgage over the property which had merged into a decree in 1913. In execution of the mortgage decree the property was purchased by the respondent in 1921. When he applied for delivery, he was obstructed by the appellant. The Court passed somewhat the following order thereon:—" It is no doubt true that the counter-petitioner filed a suit in the District Munsif's Court for vacation of the order (cancelling his revenue sale) but until and unless it is so vacated, he is not entitled to resist delivery of the item. The decision in that suit will be binding upon the petitioner also since he is impleaded as a defendant therein. His objection is disallowed." In the suit the appellant succeeded and claimed back possession by way of restitution.

Held, the appellant has acquired a title independent of the respondent's mortgage. The order on the petition is final under O 21, R. 103, but the order itself is only that pending the suit, delivery must be given subject to the result of the suit. Since the Court itself deprived him of possession, it should itself put him back. Apart from S. 144, Civil Procedure Code, " if a Court has done obvious injustice, it will pay back to justice what it owes " under S. 151, Civil Procedure Code.

V. Viyyanna for Appellant.

S. Kanakam for Respondent.

S. V. V.

Sundaram Chetty, J. S. A. No. 192 of 1931.
12th October, 1932.

Damages—Suit for damages owing to wrongful execution of decree in a previous suit between same parties—Agreement between parties in the previous suit that the decree-holder should not execute his decree until a certain promissory note in judgment debtor's favour had been sued upon and satisfaction towards decree obtained —Promissory note endorsed over to decree-holder—Decree-holder allowing the promissory note to become time-barred—Subsequent execution by decree-holder—Whether judgment-debtor can sue for damages for loss by breach of agreement.

Plaintiff brought a suit for recovery of damages for wrongful execution of a satisfied decree by the defendants against him. In

a previous suit filed by defendants against the present plaintiff an agreement was entered into between the parties whereby it was agreed that a certain promissory note executed in favour of plaintiff by a third person should be endorsed over to the defendants and that until the defendants had filed a suit and obtained a decree on that note for satisfaction of the amount due to them from the plaintiff, they should not execute the decree obtained by them in the suit against plaintiff. The said promissory note was not sued upon before it became time-barred nor was it endorsed over to plaintiff before it had become time-barred so as to enable him to file a suit himself and obtain a decree on it, though he intimated to the plaintiff earlier that he would not sue on the note but that the plaintiff must make arrangements to sue.

Held, that the plaintiff was certainly entitled to recover damages from defendants by showing that he really sustained loss by reason of the promissory note having been allowed to become time-barred.

108 E. R. 489 not applied.

32 Cal. 27 (P. C.) distinguished.

The proper issue for determining the question of damages is whether by reason of the breach of the agreement by the defendants not filing the suit on the pronote and allowing the pronote while in their custody to become time-barred the plaintiff has sustained any and what damage and what is the proper and reasonable amount of damages available to him.

S. Varadachariar and *A. C. Sampath Aiyangar* for Appellants.

B. Sitarama Rao and *N. Gopala Menon* for Respondents.

K. C.

Burn, J. C. M. P. No. 4004 of 1932.
18th October, 1932.

Writ of Prohibition—Registrar of Co-operative Societies—Legal advisor and director of Urban Bank—Account of business done by him in Court—If an officer of the bank in respect of such business.

The Deputy Registrar called on the petitioner to account to him in respect of sums received from the Urban Bank and spent by him on Court business done by him for the bank between 1919 and 1932. The petitioner was a legal advisor of the bank and as such an ex-officio member of the Board of Directors of the bank.

Held, that he was an officer of the bank within the meaning of S. 2 (*d*) of the Co-operative Societies Act, 1912, and this being a dispute between the petitioner and the Society, it is one which falls to be decided by the Registrar under S. 43, cl. (*l*) of the Act and R. 41-A of the rules made thereunder. The fact that his position as legal advisor gives him under the rules a seat on the Board of Directors makes all the difference between this case and the English cases of Solicitors and Co-operative Societies.

T. R. Venkatarama Sastriar and *P. S. Narayanaswami Aiyar* for Petitioner.

P. Govinda Menon for Respondent.

S. V. V.

Bardswell, J. C. M. Ps. Nos. 3428 and 4876 of 1932.
19th October, 1932.

Injunction—High Court in the exercise of appellate or revisional jurisdiction over Subordinate Courts in moffussil—If can issue an injunction apart from Civil Procedure Code.

In a case coming before the High Court on appeal or revision from the decision of a Subordinate Court in the moffussil, the High Court can only apply such law or equity and rule of good conscience as would be applied by that moffussil Court. It can therefore only grant an injunction in respect of such a case only in accordance with the provisions of O. 39, Civil Procedure Code.

23 L. W. 85; 26 L. W. 899 and C. M. P. No. 3349 of 1932 followed.

35 L. W. 168 and 33 Bom. 469 discussed and not followed.

Case-law discussed.

K. S. Champakesa Aiyangar for Petitioner.

Watrap S. Subramania Aiyar for Respondent.

S. V. V.

N R C

Bardswell, J. C. M. P. No. 1431 of 1932, etc.
19th October, 1932.

Appellate Side Rules—Ad interim *injunction—Injunction absolute after notice to the respondent—If a fresh injunction and fresh fee to be paid.*

What is generally termed an interim injunction, or an injunction *ad interim*, is strictly speaking, not an injunction at all but only an order of an injunctional character and of its very nature limited to the period within which it is directed that it shall be in force. The injunction ordered after notice will be the injunction as contemplated by O. 39, R. 3, and for its being issued, the fee has to be paid.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Petitioner in C. M. P. No. 1431 of 1932.

The Government Pleader and *N. Rama Rao* for Respondents in C. M. P. No. 1431 of 1932.

S. V. V.

Pakenham Walsh and Bardswell, JJ. L. P. A. No. 70 of 1932.
21st October, 1932.

Civil Procedure Code (V of 1908), *O.* 44—*Appeal in* forma pauperis—*Meaning of proviso to R.* 1 *of O.* 44, *Civil Procedure Code*—" *Contrary to law*"—*If mere perusal thereof should show it to be contrary to law—Notice to respondent, if necessary.*

Held, (reversing Burn, J.) that under the proviso to O. 44, R. 1, it is enough if there is an arguable point of law for leave being granted. No notice need go to the respondent for this stage.

53 Mad. 245 followed.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) with *Ch. Raghava Rao* for Appellant.

S. V. V.

Sundaram Chetty, J.
30th September, 1932.

Application No. 2776 of 1932 in C. S. No. 283 of 1931.

Mortgage suit—Claim calculated up to date of plaint—Plaint filed long after—Passing of preliminary and final decree—Payment to decree-holder from sale proceeds—Subsequent discovery of mistake regarding the amount due—Application by decree-holder for amendment of the decree—Maintainability—Civil Procedure Code, 1908, *S.* 152.

The plaintiff sued on a mortgage and the claim for principal and interest was calculated up to the date of the signing of the plaint. The plaint was actually presented two months thereafter and a preliminary decree was passed calculating the amount due from the date of presentation of the plaint. Subsequently a final decree was passed, mortgaged property sold and from the sale proceeds the amount shown in the preliminary decree was paid to the decree-holder. Subsequently the decree-holder discovered that the claim for interest between the date of the signing of the plaint and the date of the presentation had been left out in the preliminary decree and applied for an amendment of the decree so as to include the same.

Held, that the Court has inherent jurisdiction to order an amendment in a case of this kind,

25 L. W. 102; A. I. R. 1924 Rang. 104; 61 M. L. J. 805 and 62 M. L. J. 350 referred to,

K. S. Rajagopala Aiyangar for Decree-holder.

V. Sivaprakasa Mudaliar for Judgment-debtor.

T. N. C. Srinivasavaradachari for subsequent mortgagee.

K. C.

Krishnan Pandalai, J.
19th October, 1932.

C. M. As. Nos. 69 and 70 of 1929 and C. R. Ps. Nos. 791, 792 and 1282 of 1929.

Civil Procedure Code (V of 1908)*—Partition suit—Right of plaintiff to withdraw suit—If defendants entitled to object to withdrawal or claim transposition—S.* 146, *O.* 22, *R.* 10 *and O.* 1, *R.* 10, *Civil Procedure Code.*

After filing a partition suit against three other branches who were admittedly the plaintiff's coparceners, the plaintiff mortgaged his share and thereafter applied to withdraw his suit, by reason, it was said, of a secret arrangement between himself and some of the defendants. At this stage two applications were made, one by the plaintiff's mortgagee to be impleaded as a plaintiff and to be allowed to continue the suit and another by the Official Receiver in the insolvency of one of the defendants to be transposed as plaintiff if necessary and to be allowed to continue the suit.

N. R. C.

Held, that the mortgagee cannot claim the benefit either of O. 22, R. 10, Civil Procedure Code, which contemplates a transferee only of an absolute interest, 1 Pat. 581 followed.

Nor can he invoke S 146, Civil Procedure Code, which is a residuary section intended to apply to proceedings other than suits.

41 Mad. 510 doubted.

44 Mad. 919 explained and distinguished.

Under the Civil Procedure Code the procedure by way of counter-claim does not obtain in this country and the rule laid down in 11 Q. B. D. 464 at 468 which is based on the English practice cannot accordingly be followed in this country to the extent of depriving a plaintiff of his power of putting an end to the suit by withdrawal, merely because if the suit had gone on the defendant might have also had his share separately decreed to him. A partition suit is no exception though by reason of anything that may happen in the course of the suit, such as a compromise or a preliminary decree or a partial partition, the defendant may acquire rights which he may be entitled to work out notwithstanding plaintiff's withdrawal.

7 Bom. 167 and 20 C. W. N. 752 explained as arising from the Original Side of the High Court where the counter-claim procedure is recognised.

1914 M. W. N. 155; 12 L. W. 563 and 49 Bom. 672 explained.

Case-law discussed.

S. Varadachariar and *C. A. Seshagiri Sastri* for Petitioner in C. R. Ps. Nos. 791 and 792 of 1929.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *T. D. Srinivasachariar* for Appellant in C. M. As. Nos. 69 and 70 of 1929.

S. Srinivasa Aiyangar, T. M. Krishnaswami Aiyar and *K. S. Venkataraman* for contesting respondent in both.

V. Rajagopala Aiyar and *T. V. Ramiah* for Petitioner in C. R. P. No. 1282 of 1929.

S. V. V.

Pakenham Walsh, J. C. R. P. No. 171 of 1931.
25th October, 1932.

Provincial Small Causes Courts Act (IX of 1887), *Schedule II, Art.* 28—*Suit for recovery of deceased daughter's stridhanam—Father claiming as preferential heir against husband—Suit, if cognizable by a Small Causes Court—Objection not taken in the Lower Court—High Court whether will interfere in revision.*

A suit by the father of a deceased Hindu married woman for the recovery from her husband of the jewels, vessels, etc., presents

made by him to her by way of stridhanam on the ground that her marriage was in the Asura form and that, therefore, the father and not the husband was the heir of her properties, falls under Art. 28 of the second schedule of the Provincial Small Causes Courts Act, 1887 and as such is not cognizable by the Small Causes Court.

49 M. L. J. 554 followed.

27 All. 622 and 19 C. W. N. 614 not followed.

In such a case of total want of jurisdiction even if the jurisdiction of the Court below was not objected to before it, the High Court will interfere in revision, set aside the decree and direct the plaint to be returned for presentation to the proper Court.

41 I. C. 276 followed.

Watrap S. Subrahmania Aiyar for Petitioner.

G. Ramanathan for *N. S. Srinivasa Aiyar* for Respondent.

K. C.

Burn, J. C. M. P. No. 4883 of 1932.

25th October, 1932.

Madras Local Boards Act (XIV of 1920), *S.* 38—*Election Rules, R.* 35—*Candidate's nomination—Cancellation by Local Government—Writ of certiorari moved in High Court for including his name in the list of nominations—Whether the order of the Government could be quashed—Writ of mandamus proper.*

The Local Government under S. 38 of the Local Boards Act and R. 35 of the Election Rules cancelled the nomination of a candidate for election to the District Board though the Election Officer had accepted it and a writ of certiorari was moved in the High Court on behalf of the person whose nomination was rejected, for calling up of the records before the Election Officer and direct the Election Officer to include his name in the list of nominations. The Election Officer and the other candidate were made parties to the petition for writ.

Held, (1) that though writ was asked nominally against the Election Officer still in reality the Government's order it was that was sought to be quashed and this Court has no jurisdiction to question the order of the Local Government. 53 Mad. 979 followed.

(2) The prayer for direction to the Election Officer to include the petitioner's name was more appropriate in a writ for mandamus than in a writ of certiorari and this Court has jurisdiction to issue a writ of mandamus only to officers in the City and even in the City not against the Governor in Council.

A. Visvanatha Aiyar for Petitioner.

The Government Pleader for Election Officer.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for rival candidate.

K. C.

Venkatasubba Rao and Reilly, JJ. C. M. A. No. 420 of 1930
25th October, 1932.

Hindu Religious Endowments Act (II of 1927), S. 70—Order in execution—If appealable—Notice under S. 70—Service of, on executive trustee—If enough.

On failure of the trustees to pay the amounts due under S. 70 of the Endowments Act, the Court on the application of the President of the Board passed an order for payment against the endowment under S. 70. The trustees preferred an appeal against the order under S. 47, Civil Procedure Code.

Held, that the appeal lay. The words in S. 70 "as if a decree had been passed for the amount by the Court" attract to the order the whole procedure in execution and also the right of appeal under S. 47, Civil Procedure Code.

14 M. L. J. 433; 31 Mad. 24; A. I. R. 1929 Lah. 228 and 46 Bom. 128 followed.

40 All. 89 distinguished.

There were eight trustees for the institution and each of them acted by rotation for a period of two years as executive trustee. Notice under S. 70 was served only on the executive trustee then in office.

Held, it was sufficient notice. The true intention is not that the trustee should be served but the institution of which he is the trustee. The funds that are liable under S. 70 are the funds of the institution and what is intended is that no proceedings should be taken against it before a proper notice is served on it. The question in each case therefore is "Has the institution been properly served or not". When by usage one of several trustees acts as the managing or executive trustee, the notice served on such trustee must be deemed to be a proper notice as against the institution.

B. Sitarama Rao for Appellant.

P. Venkataramana Rao, T. Kumarasamiah, M. Lakshman Nayak, M. R. Venkatraman and *S. V. B. Rao* for Respondents.

S. V. V.

Reilly and Venkatasubba Rao, JJ. C. M. A. No. 481 of 1930.
18th October, 1932.

Civil Procedure Code (*V of* 1908), *S.* 145 *and O.* 21, *Rr.* 95 *and* 97—*Third person surety giving immovable property as security—Execution against surety bringing charged property to sale—Execution purchase of the same property in a prior mortgagee's suit against surety—Sale in execution in pursuance of the security bond subsequently to the first mortgagee's purchase—Proceedings against first mortgagee's purchaser—Order on—Appealability.*

Where in a suit between two persons, a third person gave security of immovable property to the Court for the due discharge of duties by the plaintiff as Receiver and in execution the liability of the Receiver was assessed and the charged property given as security was sought to be sold and ultimately purchased by the defendant in the suit and he applied under O. 21, Rr. 95 and 97 of the Civil Procedure Code to remove the obstruction by a prior mortgage-decree-holder-purchaser whose purchase in execution was subsequent to the proceedings taken against the surety but prior to the purchase by the defendant and the petition was dismissed by the Lower Court,

Held, an appeal lay against the decision of the Lower Court on the principle of 42 All. 158, although the case might not fall within the provisions of S. 145 of Civil Procedure Code.

K. V. Sesha Aiyangar for Appellant.

C. A. Seshagiri Sastri for Respondent.

K. C.

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Pakenham Walsh, J. C. R. P. No. 294 of 1932.
25th October, 1932.

Civil Procedure Code (*V of* 1908), *O.* 11, *R.* 1—*Interrogatories—Suit on a promissory note—Defence that pronote was given merely as security and not to be enforced—Defendant if entitled to administer interrogatories as to circumstances under which the pronote was executed.*

Where in a suit on a promissory note the plea of the defendant was that the promissory note was not supported by consideration but was given as security for the return of an *othi* deed which the defendant had to return to the plaintiff, but could not do so as it had been filed in Court in a pending suit and interrogatories were sought to be administered by the plaintiff as to the circumstances under which the promissory note came to be executed,

Held, that the burden having been on the defendant until he had let in all the evidence he had in proof of his defence, he was not entitled to have the interrogatories administered.

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41 Cal. 6 distinguished.

Watrap S. Subrahmania Aiyar for Petitioner.

S. Krishnaswami Aiyangar for Respondent.

K. C.

Pakenham Walsh and Bardswell, JJ. L. P. A. No. 75 of 1929.
26th October, 1932.

Partnership—How dissolved—Article of Limitation applicable—Onus to prove dissolution—Plaintiff accepting onus—If can complain in appeal.

A partnership will not be dissolved merely because the business is closed, but it must be dissolved in one or other of the ways known to and recognised by the law.

89 I. C. 122; A. I. R. 1920 All. 378 and 66 I. C. 811 followed.

Where the plaintiff has accepted the onus on the issues as they were framed and evidence was gone into on that basis and the parties proceeded to trial accordingly, it is too late for plaintiff to afterwards complain in appeal that the onus was wrongly thrown on him.

53 M. L. J. 431 followed.

If the suit is for dissolution and taking of accounts of a partnership that had not been dissolved, then Art. 106 will not apply but only Art. 120. But when the suit is brought in respect of a partnership that has already been dissolved, then Art. 106 will apply. It is not open to a plaintiff to bring a suit saying that a partnership still subsists, when it has, in fact, been dissolved and then claim the benefit of Art. 120 on the basis of the untrue contention.

66 I. C. 811 and A. I. R. 1930 Lah. 378 followed.

Dissolution of a partnership at will can be inferred from circumstances. (*See* 36 Mad. 185.)

A. Visvanatha Aiyar and *A. Ramaswami Aiyar* for Appellant.

K. Krishnaswami Aiyangar for Respondent.

S. V. V.

Burn, J. Cr. R. C. Nos. 590 and 600 of 1932.
3rd November, 1932.

Criminal Procedure Code (V of 1898), *S.* 188, *Proviso* (1)—*Applicability—Charge for offence under Ss.* 379-411, *Indian Penal Code—Offence of theft not proved—Possession of stolen property in French territory proved—Certificate of Political Agent if necessary.*

The accused, who were resident within British limits, were charged under Ss. 379-411, Indian Penal Code, on the ground that they either committed theft or retained the stolen property within the British limits. The offence of theft was not proved but the accused were proved to have been in possession of the stolen property which they had sold in French territory and the property was recovered from the French limits. An objection to the trial having been raised under the first proviso to S. 188, Criminal Procedure Code.

Held, that the charge was for dishonest retention of stolen property in French territory and could not therefore be proceeded with in the absence of a certificate of the Political Agent of the French territory.

V. Rathnam for Petitioner in Cr. R. C. No. 600 of 1932.

R. Somasundaram Aiyar for Petitioner in Cr. R. C. No. 590 of 1932.

The Public Prosecutor (*L. H. Bewes*) for the Crown.

B. V. V.

Venkatasubba Rao and Curgenven, JJ. C. R. P. No. 1112 of 1929.
4th November, 1932.

Specific performance—Decree for—In the nature of preliminary decree—Right of plaintiff and defendant to enforce the decree—Plaintiff in a purchaser's action for specific performance obtaining a decree but not depositing money into Court—Whether defendant can enforce—Suit against vendor and those who bought from him with notice of agreement—Suit decreed—Whether vendor alone can enforce the decree.

A decree for specific performance is in the first instance of a preliminary nature and all further reliefs consequential on the same can be obtained in the action itself. A specific performance decree enures for both the parties and both the plaintiff and the defendant can enforce the same and work out their rights in the action itself.

46 Mad. 148 and 59 Cal. 501 followed.

In a purchaser's action for specific performance where there has been a decree for specific performance, if the plaintiff fails to deposit the amount into Court under the decree, it is open to the defendant to enforce the same. Where, however, a purchaser brought a suit for specific performance against the vendor and other persons

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who bought portions of the property subsequently from the latter with notice of the agreement and a decree for specific performance is passed against the vendor and the purchasers from him, the vendor though he still owns a considerable portion of the property is not entitled to enforce the decree against the will of the purchasers from him.

C. A. Seshagiri Sastri for Petitioner.

K. S. Desikan, K. S. Venkataramani, R. Somasundaram Aiyar, V. V. Chowdry and *G. S. Venkatarama Aiyar* for Respondents.

K. C.

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Curgenven, J. C. R. P. No. 511 of 1932.
4th November, 1932

Civil Procedure Code (V of 1908), *O.* 44—*Application to appeal in* forma pauperis—*Notice to respondent issued—Court if can go into merits of the case after notice—Scope of enquiry after notice.*

A Court is not justified after notice to respondent to examine the question whether the judgment appealed from is or is not contrary to law. It is the duty of the Court to peruse the records before issuing notice and satisfy itself that it is contrary to law or otherwise unjust. Where a preceding Judge ordered notice on the petition and the petition comes on after notice before another Judge, it must be presumed that the first Judge was satisfied about the merits and the successor should have taken it at that stage and enquired only about the pauperism.

6 Pat. 687 and A. I. R. 1929 Pat. 27 followed.

P. Satyanarayana Rao for Petitioner.

A. Venkatachalam for Respondent.

S. V. V.

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Venkatasubba Rao, J. S. A. No. 1693 of 1928.
11*th November,* 1932.

Defamation—Absolute privilege—Madras Estates Land Act, S. 75.

A proceeding before a Revenue Inspector under S. 75 of the Madras Estates Land Act is a quasi-judicial proceeding. Hence any defamatory statement made by a party before such an officer against his opponent, even if irrelevant, is absolutely privileged if it be connected with the enquiry on hand.

Gatley on " Slander and Libel," 1924 ed., Ch. XI, pp. 182, 183 and 184, Folkard " Slander and Libel," VII ed., p. 100 and *Seaman* v. *Netherclift,* (1876) 2 C. P. D. 53, relied on.

21 M. L. J. 85 followed.

N. Rajagopalachariar for Appellant.

A. Srinivasa Aiyangar for Respondent.

K. C.

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Krishnan Pandalai, J. C. M. A. No. 59 of 1931 and
2nd November, 1932. S. A. No. 434 of 1932.

Registration Act (*XVI of* 1908), *S.* 32—*Presentation of document—Minor claiming under document—Powers-of-Attorney Act,* 1882, *S.* 5—*Applicability to Hindus—Minor married woman—Right to execute power-of-attorney.*

A minor claiming under a document can present the document for registration under S. 32 of the Registration Act.

56 M. L. J. 218 (P. C.) and 33 I. C. 33 referred to.

The Powers-of-Attorney Act, 1882, applies to Hindus also. Under S. 5 of that Act a minor married woman can execute a power-of-attorney as if she were of full age and appoint an agent to present a document for registration.

A. Lakshmayya for Appellant.

M. Appalachari and *K. Ramamurti* for Respondents.

B. V. V.

Venkatasubba Rao, J. C. R. Ps. Nos. 1345 and 1407 of 1928.
10th November, 1932.

Civil Procedure Code (*V of* 1908), *S.* 73—"*Assets held by a Court*"—*Meaning of—Attachment—Private alienation—Money paid into Court for satisfaction of the decree—Whether assets available for rateable distribution.*

Certain properties were attached by a decree-holder, but the judgment-debtor subsequent to the attachment sold the properties and the vendee paid the money into Court and applied for satisfaction of the decree being recorded. In the meanwhile, before the payment into Court, other decree-holders had applied for execution of their decrees.

Held, that the money paid into Court by the vendee was available for rateable distribution and the attaching creditor was not exclusively entitled thereto.

36 Bom. 156 not followed.

47 Cal. 515 followed.

21 Bom. L. R 975 and 41 Mad. 616 referred to.

B. C. Seshachala Aiyar and *N. S. Srinivasan* for Petitioners.

T. Pattabhirama Aiyar for Respondent.

S. R.

N. R. C.

Madhavan Nair, J. S. A. No. 2251 of 1927.
18th November, 1932.

Hindu Law—Alienation by the daughter of the last male-owner —Reversioner's suit to set aside sale—Consideration binding to a major extent and found not binding to a small extent—Whether reversioner entitled to the amount so found not binding.

A reversioner filed a suit to impeach a sale for a sum of Rs. 400 executed by the daughter of the last male-owner and it was found by the Lower Appellate Court that the consideration to the extent of Rs. 325 was for binding purposes but that Rs. 75 was utilised for a purpose not binding on the reversioner. It was contended for the alienee relying on 49 All. 149 (P. C.) that the sale should be upheld and no equities would arise between the parties.

Held, that the sale should be upheld, but for the portion of the consideration found to be not binding as distinguished from a case where it has not been proved to be binding, the reversioner is entitled to the consideration so found not to be binding on him.

49 All. 149 at 161 (P. C.) referred to and distinguished.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

K. S. Krishnaswami Aiyangar and *N. R. Govindachariar* for Respondent.

K. C.

Curgenven, J. C. R. P. No. 544 of 1931.
7th November, 1932.

Limitation Act (IX of 1908), *S.* 18 *and Art.* 118—*Claim that an adoption was invalid—Adoption known before but the invalidating circumstances learnt within* 8 *months of suit—S.* 18 *if saves limitation.*

Where the mother of the plaintiff made an adoption nearly 40 years ago under the authority given to her by her husband and the plaintiff applied for leave to sue in *forma pauperis* for a declaration that the alleged adoption was not true in fact nor valid in law, alleging that the authority to adopt was not given and that the fact of want of authority was kept back from the plaintiff,

Held, that the Court was justified in dismissing an application to sue in *forma pauperis* on the ground that the plaint did not disclose a subsisting cause of action, as it did not allege that the alleged adoption did not come to the plaintiff's knowledge more than six years prior to suit. S. 18 of the Limitation Act can be invoked only if the knowledge of the alleged adoption had been kept back from the plaintiff and not on the ground that the plaintiff was not aware of or informed of the non-existence of the husband's authority relied on for the adoption.

C. Rama Rao for Petitioner.

S. Varadachariar and *S. V. Venugopalachariar* for Respondent.

K. C.

Curgenven, J. C. M. S. A. No. 132 of 1928.
23rd November, 1932.

Foreign Court—Ex parte *decree—Decree transferred for execution to British Indian Court—Arrest—Defendant obtaining release on furnishing security—Defendant moving Foreign Court to set aside* ex parte *decree—Dismissal for default—Application to British Indian Court to dismiss execution application—Foreign Court's decree absolute nullity.*

An *ex parte* decree obtained against the defendant in a personal action in the Court of a Native State of India was transferred for execution under S. 44, Civil Procedure Code, to a District Munsif's Court in British India. The defendant was arrested in execution but he obtained his release on his furnishing security with a view to moving the Native State Court to set aside the *ex parte* decree. The defendant subsequently applied to the Native State Court to set aside the decree but the application was dismissed for default of appearance. Then he put in an application to the Court in British India to dismiss the execution petition on the ground that the decree

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passed against him in the Foreign Court was by international law a nullity and so could not be executed against him.

Held, (1) that a decree pronounced ***in absentem*** in a Foreign Court to the jurisdiction of which the defendant has not in any way submitted himself is by international law an absolute nullity.

22 Cal. 222 : 4 M. L. J. 267 (P. C.) followed.

(2) that the submission to jurisdiction of the Foreign Court must be in the suit itself and before the decree is passed; that the subsequent conduct of the defendant cannot retrospectively validate a decree which was originally a nullity.

8 Lah. 54; (1914) 3 K. B. 145 and 53 All. 747 referred to.

(3) that even if it is assumed that the defendant had submitted to the foreign jurisdiction it cannot be said the submission was voluntary, as he moved that Court only after his arrest in execution of the decree.

39 Mad. 24 and 55 L. J. Q. B. D. 39 referred to.

Leave to appeal granted.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Appellant.

K. Bhashyam Aiyangar and *V. C. Veeraraghavan* for Respondent.

K. C.

Reilly and Cornish, JJ. A. S. No. 245 of 1926.
2nd December, 1932.

Minor—Suit on promissory note—Promissory note executed by minor's de facto *guardian—Binding purposes—Guardian not a legal or legally appointed one—Whether decree could be passed against minor or his estate.*

No decree can be passed either against a minor or his estate in a ***suit on a promissory note*** executed by the *de facto* guardian of the minor, (not being a legal or legally appointed guardian), even though the amount was borrowed for purposes binding on the minor under his personal law.

Distinction between suits based on the promissory note and on the consideration for the same pointed out.

42 Mad. 185 (F. B.) considered.

35 L. W. 397 doubted.

R. Gopalasami Aiyangar and *S. Ramanujam* for Appellant.

S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for Respondent.

K. C.

Krishnan Pandalai, J. C. R. P. No. 1205 of 1932.
3rd November, 1932.

Civil Procedure Code (V of 1908), O. 26, R. 5—Commission to witness—Witness resident in Travancore State but within 200 miles of Court—Commission if should issue.

Though witnesses resident in Travancore State can be served with summons to give evidence in British Indian Courts, yet as there is no means by which such a witness can, if he fails to appear on summons, be compelled to appear, an application for the issue of a commission to examine such a witness should ordinarily be granted. The provisions of O. 16, R. 19 about the two hundred miles limit does not apply to the case of a person outside British India.

C. S. Venkatachariar for Petitioner.

S. Ramaswami Aiyar for Respondent.

S. V. V.

Pakenham Walsh, J. S. A. No. 1098 of 1928.
15th November, 1932.

Ordinance IX of 1914—Madras District Municipalities Act, 1884, Ss. 44 and 45—Void contract by Municipality—Benefit if can be restored—S. 65, Contract Act—Limitation—Acknowledgment by agent—Validity.

Held, that when the statutory requirements for entering into a contract are not complied with, the contract by the Municipality is void.

53 Mad. 352 followed.

In such a case of void contract for breach of statute, S. 65, Contract Act, does not apply and the benefit derived cannot be refunded.

50 Cal. 929 and 45 All. 179 explained.

1930 Mad. 945; 57 M. L. J. 756 and 54 Cal. 189 distinguished.

The Ordinance does not take away the power of the Municipality to contract under the Act.

An agent who is authorised to enter into a contract is also empowered to acknowledge the liability so as to save limitation.

24 C. W. N. 153; 85 I. C. 633 and 2 Rang. 367 followed.

T. Rangachariar and *S. Narayana Aiyangar* for Appellant.

K. Rajah Aiyar and *K. S. Rajagopalachari* for Respondent.

S. V. V.

Reilly and Cornish, JJ. Appeal No. 29 of 1927
22nd November, 1932. and C. M. A. No. 180 of 1927.

Civil Procedure Code (V of 1908), O. 41, R. 33—Power of Appellate Court to re-open against ex parte *defendants—Limits of power.*

In a suit upon a settlement executed by a deceased person against seven persons as in possession of the properties, an *ex parte*

decree was passed, but on an application by 2 to 6 defendants alone, the suit was restored against all the defendants. The High Court revised the order and confined the restoration to the defendants 2 to 6 alone and confirmed the *ex parte* decree against 1 and 7 defendants. After trial, the Trial Court held the settlement deed was not genuine and dismissed the plaintiff's suit On appeal the High Court confirmed the finding that it was not genuine. The question then arose if under O 41, R. 33 the High Court can exercise its powers and cancel also the decree against defendants 1 and 7, who had not appealed and were not parties to the appeal.

Held, that in view of the finding that the settlement deed was not genuine, it would be illogical and inconsistent to retain the decree against 1 and 7 defendants, which was passed on the footing that the settlement deed was genuine; that this was a proper case for the application of O. 41, R. 33 and set aside the decree *in toto* even as against defendants 1 and 7.

53 Mad. 881 (F. B.) and 1 L W. 376 followed.

Case-law discussed.

K. S. Krishnaswami Aiyangar, S. Rajagopalachari and *K. S. Desikan* for Appellant.

S. Varadachariar and *S. Ramaswami Aiyar* for Respondents.

S. V. V.

Krishnan Pandalai, J. S A. No. 1712 of 1928.
29th November, 1932.

Practice and procedure—Civil Procedure Code (V of 1908), S. 35—Costs disallowed by the Trial Court giving reasons—Reversal of by first Appellate Court—Right to—O. 24, R. 4, Civil Procedure Code—How far applicable to mortgage suits.

A mortgagee filed a suit to recover the mortgage money from the mortgagors and the purchaser of the equity of redemption who was directed to pay the mortgage amount under the sale deed, and the purchaser paid the amount into Court which was accepted by the plaintiff as satisfaction in full of his claim. . The first Court finding that the plaintiff was most to blame for the litigation directed him to pay the defendant's costs.

Held, The discretion exercised by him in awarding costs ought not to be lightly interfered with by the first Appellate Court without assigning proper reasons. Under S. 35, Civil Procedure Code, award of costs is entirely in the discretion of the Trial Court. O. 24, R. 4, Civil Procedure Code, applies to mortgage claims also.

R. Rajagopala Aiyangar for Appellant.

V. K. Srinivasa Aiyangar for *S. Panchapagesa Sastri* for Respondent.

S. V. V.

Madhavan Nair and Jackson, JJ. A. S. No. 182 of 1926.
1st December, 1932.

Mortgage—Subrogation—Right to—Third mortgagee paying off first mortgagee without knowledge of the existence of second mortgagee—If entitled to priority.

A third mortgagee was directed by the mortgagor to pay to the first mortgagee out of the consideration for his mortgage and the third mortgagee had then no knowledge of the existence of the second mortgage,

Held, the third mortgagee is entitled to subrogation to the extent to which he has paid the first mortgagee as he is not then paying as the agent of the mortgagor and it is obviously to his benefit. The fact that the mortgagee did not know of the second mortgagee does not matter.

K. Rajah Aiyar, V. Ramaswami Aiyar and *K. S. Rajagopalachari* for Appellant.

K. Bhashyam and *T. R. Srinivasan* for Respondent.

S. V. V.

Curgenven, J. S. A. No. 19 of 1929.
1st December, 1932.

Madras Estates Land Act (I of 1908), S. 77—Rent decree execution while suit in Civil Court re *title to Kudivaram pending*—Lis pendens.

Pending a civil suit regarding the right and title to the Kudivaram in certain lands between *A*, the registered pattadar, and *B*, who claimed adversely to him, the landholder filed a suit against *A* and *B* for recovery of arrears of rent. Under S. 77 of the Estates Land Act, he obtained a decree against *A* alone and got the holding sold in execution of that decree. *B's* title was recognised in the civil suit and he brought a suit to set aside the sale in execution of the rent decree as vitiated by *lis pendens* and on the ground that he having been exonerated in the rent suit, he was not affected by the sale.

Held, that the doctrine of *lis pendens* was not applicable to claims such as the landholders' which constitute a first charge on the holding and are therefore paramount to the right of both *A* and *B*.

5 Mad. 371 and 26 M. 230 followed.

1 Pat. 287 distinguished.

Secondly, it is enough if the suit for arrears of rent is filed against the defaulting ryot only who is the registered pattadar and the sale of the holding in execution of a decree obtained against him passes a good title to the purchaser even as against persons who

may own the Kudivaram interests but have not been recognised as pattadars by the landholder.

V. Ramaswami Aiyar for Appellant.

C. S. Venkatachariar for Respondent.

S. V. V.

Burn, J. Cr. R. C. No. 167 of 1932.
2nd December, 1932.

Criminal Procedure Code (V of 1898), Ss. 422 and 545 (b) —Appeal against an order of conviction by accused and payment of compensation under S. 545 (b) to complainant—Notice to complainant necessary.

In an appeal by the accused against an order of conviction under S. 323, Indian Penal Code, wherein compensation is also awarded to the complainant under S. 545 (*b*), Criminal Procedure Code, notice of the date of hearing of the appeal ought to be given to the complainant. Though the omission to give notice is not an illegality, it is clearly a grave irregularity and contrary to all sense of fairness.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar* for Complainant.

A. Nagaswami Aiyar for Accused.

The Public Prosecutor for the Crown.

K. C.

Curgenven, J. S. A. No. 1670 of 1928.
5th December, 1932.

Hindu Law—Sale of minor's lands for discharging father's debts—Consideration found binding up to two-thirds of the amount —Purchase of fresh lands with the balance that did not go for discharging debts of father—Whether sale could be upheld.

A minor sued to set aside a sale effected by his guardian of his properties for a sum of Rs. 600. It was found that out of the consideration a sum of Rs. 400 went in discharge of the debts of the father of the minor and the balance was utilised for the purchase of lands for the minor.

Held, that without deciding the question as to whether sale of lands for the purchase of other lands for the minor will be binding on him or not, the sale, in that it was effected for substantial necessity, must be upheld unconditionally.

49 All. 149 (P. C.) and 51 All. 430 (P. C.) followed.

K. S. Desikan for Appellant.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Respondents.

K. C.

[END OF VOLUME LXIII.]